(15,914.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 626.

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM SUTHERLAND.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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In the Supreme Court of Ohio.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff in Error,
v.
WILLIAM SUTHERLAND, Defendant in Error.
} Assignment of Error.

The said plaintiff in error, The Baltimore and Ohio Railroad Company, here shows to the court that in the record of the proceedings of the circuit court of the United States for the western division of the northern district of Ohio and in the court of common pleas of Huron county, Ohio, wherein William Sutherland is plaintiff and The Baltimore and Ohio Railroad Company is defendant, and in the proceedings and judgment of the circuit court of Huron county, Ohio, and of the supreme court of the State of Ohio, on error to said court of common pleas, wherein The Baltimore and Ohio Railroad Company is plaintiff in error and William Sutherland defendant in error, a certified copy of which record in all of said counts in said cause is hereto attached and herewith filed, there is manifest error in this, to wit:

1st. The said the circuit court of the United States for the western division of the northern district of Ohio erred in the order made by it on the 6th day of June, 1892, remanding said cause to the court of common pleas of Huron county, Ohio, upon the third ground contained in the motion of the plaintiff therein, filed June 6th, 1892, for the reason that the said order of the said circuit court remanding said cause upon the ground stated in said third clause of said motion and the order of the court remanding said cause for the reason therein stated was erroneous and absolutely void, and the said circuit court of the United States did not lose its jurisdiction of said cause by reason of said order.

2nd. The said common pleas court erred in taking jurisdiction of said cause and proceeding to trial therein for the reason that it had not regained its jurisdiction after the same had been removed to the United States circuit court on the 5th day of December, 1890.

3rd. The said circuit court of Huron county, Ohio, erred in refusing to reverse the judgment of the said court of common pleas upon the first ground stated in its petition in error filed therein, and the said the supreme court erred in affirming the said judgment of the said circuit court.

4th. Upon the whole record it is shown that the plaintiff in error had the right to have said cause tried in said circuit court of the United States for the northern district of Ohio, western division, instead of said common pleas court of Huron county, Ohio, and both of said courts erred, the former in relinquishing and the latter in taking jurisdiction of the same.

Whereupon the said plaintiff in error prays that the judgment of the supreme court of Ohio be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it

has lost thereby, and it prays for such other and further relief as may appear proper.

J. H. COLLINS,
Attorneys for Plaintiff in Error.

Supreme Court of Ohio.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff in Error, *v.* WILLIAM SUTHERLAND, Defendant in Error.	Petition for Writ of Error.

To the Honorable Thad. S. Minshall, chief justice of the supreme court of the State of Ohio:

Your petitioner, The Baltimore and Ohio Railroad Company, a corporation organized under the laws of the State of Maryland, and a citizen of the said State of Maryland, and having its principal place of business in the city of Baltimore, in said State, to your honor respectfully represents and sets forth that this suit was commenced in the court of common pleas of Huron county on the 14th day of August, A. D. 1882, and that afterwards, on the 7th day of November, A. D. 1882, this defendant, The Baltimore and Ohio Railroad Company, appeared in said court of common pleas of Huron county, Ohio, and filed therein its petition for the removal of said cause to the circuit court of the United States for the western division of the northern district of Ohio, and the said defendant at the same time filed therewith a good and sufficient bond, which was duly approved by the clerk of said court, and said cause was thereupon removed to the said circuit court of the United States for the western division of the northern district of Ohio, in which court said cause remained and continued until the December term thereof for the year 1884, when the same was tried to a jury, which resulted in a judgment in favor of the plaintiff and against the defendant for the sum of eight thousand dollars; that said cause was afterwards taken on writ of error to the Supreme Court of the United States, in which court the judgment of the said circuit court of the United States for the northern district of Ohio, western division, was reversed and remanded with directions to remand said cause to the court of common pleas of Huron county, Ohio, because of some defect in the original petition for the removal of the same to the said circuit court of the United States, and that afterwards, on the 13th day of August, A. D. 1890, the said cause, in pursuance of the order of the Supreme Court of the United States, was remanded to the court of common pleas of Huron county, Ohio, and that afterwards, on the 5th day of December, 1890, and during the first term of the said court of common pleas of Huron county, Ohio, at which said cause could be tried, and before the trial thereof, the said defendant filed its petition and bond in the circuit court of the United States for the northern district of Ohio, western division, under the provisions of the second section of the act of Congress approved March 3, 1887, entitled "An act to deter-

mine the jurisdiction of the circuit court and to regulate the removal of causes from the State courts," and at the same time the said defendant filed in the circuit court of the United States its affidavit establishing to the satisfaction of the said circuit court of the United States that upon account of local prejudice existing in the said county of Huron and State of Ohio it could not obtain justice therein; and upon the filing of said petition and bond the said circuit court of the United States for the northern district of Ohio, western division, made an order removing said cause from the court of common pleas of Huron county, Ohio, to the said circuit court of the United States, and a transcript was duly certified by said court of common pleas of Huron county, Ohio, and filed in said circuit court of the United States; that said cause remained in said court and on the docket thereof until the 12th day of September, 1891, when the said plaintiff, William Sutherland, filed a motion therein to remand said cause to the said court of common pleas of Huron county, Ohio; which said motion, after a full hearing thereof upon the original petition and affidavit for such removal and additional affidavits filed by both parties, was by the said circuit court of the United States overruled; and afterwards, on the 6th day of June, 1892, said William Sutherland filed an additional motion in said circuit court of the United States for the remanding of said cause to said court of common pleas of Huron county, Ohio; which said motion the court also overruled, except the third clause of the same, being upon the grounds that said petition for removal was not filed in time authorized by the act of March 3, 1887, corrected by the act of August 3, 1888, as interpreted in Fisk *v.* Henrie, 142 *U.* S., 459, and upon said grounds solely said cause was remanded to the court of common pleas of Huron county, Ohio.

And the said plaintiff in error here further shows to the court that the said order of the circuit court of the United States for the northern district of Ohio, western division, remanding said cause to the court of common pleas of Huron county, Ohio, was erroneous and an absolute nullity, and the said court of common pleas of Huron county, Ohio, never obtained jurisdiction of said cause under said order remanding the same, and that the said cause never was in fact pending in the court of common pleas of Huron county, Ohio, after the 5th day of December, 1890, and that one of the errors assigned in the circuit court of Huron county, Ohio, showed that the said court of common pleas had no jurisdiction over said cause of action at the time of the trial thereof, *and* the same having been removed and was then pending in the circuit court of the United States, western division of the northern district of Ohio, which had the sole jurisdiction thereof; and notwithstanding the said want of jurisdiction the said court of common pleas of Huron county, Ohio, proceeded to the trial of said cause and rendered judgment therein in favor of William Sutherland and against the Baltimore and Ohio Railroad Company; and notwithstanding the said error of said court of common pleas of said county the circuit court of said county rendered judgment affirming said judgment of said

court of common pleas, whereby the said plaintiff in error was deprived of the privilege of having said cause tried in the circuit court of the United States.

Your petitioner further represents and states that in the rendition of said judgment by the said court of common pleas of Huron county, Ohio, and the affirmance thereof by the said circuit court and the affirmance of the judgment of the said circuit court by the supreme court of the State of Ohio the said plaintiff in error, The Baltimore and Ohio Railroad Company, has been deprived of the right to have said cause tried in the circuit court of the United States for the northern district of Ohio, western division, instead of the court of common pleas of Huron county, Ohio, which right it had and possessed under the laws of the United States relating to the removal of causes from the State to the United States courts; but the said court of common pleas, circuit court, and the supreme court (the latter being the highest court of law or equity in the State of Ohio in which a decision can be had in said action) held and determined that the exercise by them of jurisdiction in said action was not repugnant to the laws of the United States hereinbefore referred to, and that the courts of the said State of Ohio had and have jurisdiction, and heard and determined the questions involved in said suit; all of which plainly appears upon the face of the record of said cause in the supreme court, a certified transcript of which is presented herewith.

Wherefore your petitioner asks leave to have its writ of error in this behalf, to the end that it may be determined by the Supreme Court of the United States whether the action of said courts is not repugnant to the laws of the United States above referred to, and it prays, further, for a supersedeas, and that the amount of the bond may be fixed by your honor.

THE BALTIMORE & OHIO RAILROAD COM'Y,
By J. H. COLLINS, *Its Att'n'y.*

Writ of error and supersedeas allowed as prayed for in the foregoing petition, the plaintiff in error to execute to the defendant in error and undertaking in the sum of twenty thousand dollars, conditioned according to law, with sufficient surety, to be approved as your honor may direct.

THAD. A. MINSHALL,
Chief Justice of the Supreme Court of Ohio.

In the Supreme Court of Ohio.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff in Error,
vs.
WILLIAM SUTHERLAND, Defendant in Error. } Bond.

Know all men by these presents that we, The Baltimore and Ohio Railroad Company, as principal, and John C. Larwill and E. T. Affleck, as sureties, are held and firmly bound unto the defendant

in error, William Sutherland, in the full and just sum of twenty thousand dollars, to be paid to the said defendant in error, William Sutherland, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of April, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a term of the supreme court of Ohio, in a suit depending in said court between The Baltimore and Ohio Railroad Company, plaintiff in error, and William Sutherland, defendant in error, a judgment was rendered against the said The Baltimore and Ohio Railroad Company, plaintiff in error, affirming the judgments of the circuit and common pleas courts of Huron county, Ohio, and the said The Baltimere and Ohio Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said William Sutherland, citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the 25th day of May, 1895:

Now, the condition of the above obligation is such that if the said The Baltimore and Ohio Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if *he* fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

THE BALTIMORE & OHIO RAILROAD COMP'Y. [SEAL.]
JNO. C. LARWILL. [SEAL.]
E. T. AFFLECK. [SEAL.]

Sealed and delivered in the presence of—
M. S. ELLIOTT.
B. F. EVANS.

Approved by—
THAD. A. MINSHALL,
Chief Justice.

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court of Ohio, before you or some of you, being the highest court of law or equity in the said State in which a decision could be had in the said suit between The Baltimore and Ohio Railroad Company, plaintiff in error, and William Sutherland, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their

validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the — of ——, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this sixth day of May, A. D. 1895.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
Clerk U. S. Circuit Court, Southern District of Ohio.

STATE OF OHIO, } ss:
City of Columbus, }

Pursuant to the command of your within writ of error, directed to us, we, under our seal, distinctly and openly, the record and proceedings within mentioned, with all things concerning the same, before the judges within named, in a certain authenticated transcript to this writ attached, do send, as within we are commanded.

Seal of the Supreme Court of the State of Ohio.

In witness whereof I, Josiah B. Allen, clerk of the supreme court of Ohio, have set my hand and seal of said court this 15th day of May, A. D. 1895.

JOSIAH B. ALLEN, *Clerk,*
By GEO. H. KOLKER, *Deputy.*

UNITED STATES OF AMERICA, ss:

To William Sutherland, State of Ohio, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State

of Ohio, wherein The Baltimore and Ohio Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered by said State court against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thad. A. Minshall, chief justice of the supreme court of Ohio, this 25th day of April, 1895.

THAD. A. MINSHALL,
Chief Justice of the Supreme Court of Ohio.

I hereby certify that on the 10th day of May, A. D. 1895, I served the said William Sutherland, who is named in this citation as defendant in error, by delivering to him a true and certified copy of this writ.

W. C. HASKELL,
U. S. Marshal,
By D. HARMAN, *Deputy.*

Service	$2 00
Copy	50
Travel, 45 mi.	2 70
Return	10
	$5 30

Docket and Journal Entries.

Supreme Court of Ohio.

THE BALTIMORE & OHIO RAILROAD CO. *vs.* WILLIAM SUTHERLAND. } No. 4099. Error to the Circuit Court of Huron County.

July 5, 1894. Petition in error and waiver of summons filed.
" " " Circuit court transcript, original papers, and bill of exceptions filed.
" " " Papers taken by J. H. Collins.
Aug. 30, " Papers returned by J. H. Collins and printed record filed.
Nov. 15, " Motion by defendant to advance and notice filed.
" " " Affidavit of defendant on motion filed.
" 27, " Motion by defendant to advance cause No. 4099 on the general docket. Ordered by the court that said motion be, and the same is hereby, allowed. (Order Book No. 13, page 597.)
Dec. 7, " Proof of service of printed record filed.
Jan. 19, 1895. Plaintiff's printed briefs filed.
Feb. 4, " Proof of service of plaintiff's printed briefs filed.
Mar. 11, " Defendant's printed briefs filed. (Doyle, Scott & Lewis.)
" 18, " Defendant's printed briefs filed. (Walker & Severance.)

Mar. 21, 1895, Proof of service of defendant's printed briefs filed.
Ap'l 10, " Plaintiff's typewritten briefs on oral argument filed.
Ap'l 16, 1895. Original papers sent to clerk of courts below.
" 16, " This cause came on to be heard upon the transcript of the record of the circuit court of Huron county and was argued by counsel; on consideration whereof it is ordered and adjudged by this court that the judgment of the said circuit court be, and the same is hereby, affirmed; and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at $—.

And it is certified by the court that there was made and argued in this case a question involving the construction of a statute of the United States, to wit, the act approved March 3, 1887, corrected by the act of August 13, 1888, as interpreted in Fisk *v.* Henarie, 142 United States Supreme Court Reports, 459, being "An act to amend sections one, two, three, and ten of the act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from State courts and for other purposes," approved March 3, 1875, the said plaintiff in error contending that under the provisions of said statute the circuit court of the United States for the western division of the northern district of Ohio had jurisdiction of this cause at the time it was tried in the court of common pleas of Huron county, Ohio, and ever since; that the order of the said circuit court of the United States for the northern district of Ohio, western division, remanding said cause to the State court, was erroneous and without any authority of law whatever, and, the decision of this court and of the common pleas and circuit courts being against the said contention of the said plaintiff in error, the said plaintiff in error excepted to such ruling and asks for the allowance of a writ of error from the Supreme Court of the United States to the supreme court of Ohio, for the reason that it has been deprived of having this cause tried in the circuit court of the United States for the western division of the northern district of Ohio instead of the said court of common pleas of Huron county, Ohio, which writ of error has been accordingly allowed.

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing is a true and full copy of the

docket and journal entries in case No. 4099, The Baltimore and Ohio Railroad Company against William Sutherland.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court this 15th day of May, A. D. 1895.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk*,
By GEO. H. KOLKER, *Deputy*.

Supreme Court of Ohio.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff in Error,
against
WILLIAM SUTHERLAND, Defendant in Error. } No. 4099.

Error to the circuit court of Huron county.

Record.

J. H. Collins, attorney for plaintiff in error.

Warren Severance, G. R. Walker, attorneys for defendant in error.

Filed Aug. 30, 1894, in supreme court of Ohio.

J. B ALLEN, *Clerk*.

In the Supreme Court of Ohio.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff in Error,
against
WILLIAM SUTHERLAND, Defendant in Error.

Petition in Error.

(Filed July 5, 1894.

In the Supreme Court of the State of Ohio.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff in Error,
against
WILLIAM SUTHERLAND, Defendant in Error. } Petition in Error.

The said plaintiff in error, The Baltimore and Ohio Railroad Company, attaches hereto a certified copy of the docket and journal entries in a cause lately pending in the circuit court of Huron county, Ohio, wherein The Baltimore and Ohio Railroad Company, this plaintiff, was plaintiff in error and William Sutherland, this defendant, was defendant in error, and the original papers in said cause are herewith filed.

And the said plaintiff in error here shows to the court that in the proceedings and judgment of the said circuit court of Huron county, Ohio, there is manifest error in this, to wit:

1. Said court erred in finding that there is no error manifest upon the face of the record in the proceedings and judgment of the court of common pleas.

2. Said court erred in affirming the judgment of the court of common pleas.

Whereupon the said plaintiff in error asks that the said judgment of the said circuit court be reversed and held for naught, and that this court render such judgment as said circuit court should have rendered.

J. H. COLLINS,
Attorney for Plaintiff in Error.

To the clerk:

Issue summons in error in the above cause to the sheriff of Huron county, Ohio, returnable according to law.

J. H. COLLINS,
Attorney for Plaintiff in Error.

Certified Copy of Journal Entry in the Circuit Court.

(Filed in Supreme Court July 5, 1894.)

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff,
v.
WILLIAM SUTHERLAND, Defendant.

THE STATE OF OHIO, }
Huron County, } ss:

I, R. K. Rood, clerk of the circuit court within and for the county of Huron, do hereby certify that the following entries and judgments are truly copied from the journals of said court, to wit:

May term, to wit, May 16, 1894.

The said parties appeared, by their attorneys, and by consent of both parties this cause came on to be heard before Judges Bentley and Haynes, Judge Scribner having been of counsel, upon the petition in error of the said The Baltimore and Ohio Railroad Company, plaintiff in error herein, together with the original papers and pleadings and a duly certified transcript of the orders and judgment of the court of common pleas of Huron county, Ohio, filed therewith in the said action, wherein Wm. Sutherland was plaintiff and The Baltimore and Ohio Railroad Company was defendant, mentioned and referred to in said petition in error, and was argued by counsel; upon consideration whereof the court find that there is no error manifest upon the face of the record in said orders and judgment of the said court of common pleas.

It is thereupon considered, ordered, and adjudged by fthe court that the judgment and proceedings of the said court o common pleas in said action in favor of the said defendant in error and again- the said plaintiff in error be, and the same are hereby, in all

things affirmed, there being, however, in the opinion of the court, reasonable ground for this proceeding in error.

It is further considered and ordered that the plaintiff in error pay the costs of this proceeding in error, taxed at $—, and in default thereof that execution issue therefor.

Ordered that a special mandate be sent to the court of common pleas of Huron county to carry this judgment into execution.

To which ruling of the court the plaintiff in error excepts.

(Certificate of clerk attached.)

In Huron Co. Common Pleas.

Petition.

(Filed August 12, 1882.)

Court of Common Pleas, Huron County, Ohio.

WILLIAM SUTHERLAND, Plaintiff,
against
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant. } Petition.

The plaintiff, William Sutherland, for a cause of action against the defendant, says:

That the defendant, The Baltimore and Ohio Railroad Company, was and is an incorporated company, and at the time of doing the wrongs hereinafter complained of had and owned a line of railroad running into and across the State of Ohio and through the county of Huron, and having and using thereon as a common carrier cars, locomotive engines, and other and usual equipments, machinery, and appurtenances to said business appertaining.

The plaintiff avers that on or about the 31st day of January, A. D. 1882, and for some time prior thereto, he was and had been in the employ of said defendant as a common laborer at its coal yard in the village of Chicago Junction, Huron county, Ohio, and by said defendant's orders placed under the immediate and personal charge and direction of one Edward Lewis, a locomotive engineer of the defendant, known as the "hostler," and while in the performance of his duty to said defendant in his said employment and while strictly obeying the orders and directions of said engineer or "hostler," said engineer so carelessly, negligently, and recklessly ran, moved, and managed one of the locomotive engines of said defendant that it was then and there run upon and against this plaintiff, breaking and crushing the bones of his right leg, lacerating and tearing the flesh between the knee and ankle joints, causing him great pain and suffering, and whereby amputation of plaintiff's leg became and was necessary, and which was done accordingly, by all which his life was for a long time in great peril and whereby he became and was for a long time dangerously sick and a great sufferer and put to great expense in trying to be healed of his said

injury, and is now and during life will be a great and constant sufferer and to a great extent helpless.

Plaintiff says that by reason of the injuries aforesaid he is rendered a cripple for life, and is and will be, so long as he may live, unable to follow his usual trade or employment, that of a stone and brick layer and plasterer, or any other useful employment, whereby he may earn a livelihood for himself and family, and all which was wholly without the fault of this plaintiff, and all to his damage in the sum of twenty thousand dollars.

Wherefore plaintiff prays judgment against said defendant in the said sum of twenty thousand dollars, and interest thereon from the 31st day of January, A. D. 1882.

WARREN SEVERANCE AND
G. R. WALKER,
Attorneys for Plaintiff.

(Verification attached.)

Demurrer.

(Filed Sept. 12, 1882.)

Now comes the defendant and demurs to the petition of the plaintiff, and for cause thereof says that the same does not state facts sufficient to constitute a cause of action.

NEWBEGIN & KINGSBURY,
Attorneys for Defendant.

Certified Copy of Order Remanding Case.

(Filed August 28, 1890.)

THE UNITED STATES OF AMERICA, }
Northern District of Ohio, West. Div., } *ss:*

At a stated term of the circuit court of the United States within and for the western division of the northern district of Ohio, begun and held at the city of Toledo, in said district, on the first Tuesday in June, being the third day of said month, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth—present, the Honorable Henry B. Brown, district judge for the eastern district of Michigan—among the proceedings then and there had were the following, to wit:

WILLIAM SUTHERLAND }
v. }
THE BALTIMORE AND OHIO RAILROAD COMPANY. }

WEDNESDAY, *August* 13, 1890.

This day came the parties, by their counsel, and came on for hearing the plaintiff's motion to remand this case to the court of common pleas of Huron county, Ohio, in conformity to the order and

direction of the Supreme Court of the United States, as contained in the mandate filed in this court on the 12th day of August, 1890, and said motion having been fully considered, it is now ordered that this case be, and it is hereby, remanded to said court of common pleas of Huron county, Ohio.

And it is further ordered that the defendant, The Baltimore and Ohio Railroad Company, pay the costs of this suit in this court, to be taxed at $—, and also that it pay the costs of the Supreme Court in this case, for all of which costs execution may issue.

(Certificate of clerk of U. S. court attached.)

Answer.

(Filed November 19, 1890.)

First answer. And now comes the said defendant, The Baltimore and Ohio Railroad Company, and admitting that it is a corporation, as averred in the petition, and that it owns and operates the line of railroad therein described, it denies each and all of the other averments contained in said petition and says that the same are not true.

Second answer. And the said defendant further says that prior to the date the plaintiff entered the service of the defendant the defendant was operating several branches and divisions in its general system of railways, one of which was a railroad from Chicago Junction, Ohio, to Chicago, Illinois, called the Chicago division, and before that date it had set on foot an organization known as the Baltimore and Ohio Employés' Relief Association, which said association was duly incorporated by the act of the General Assembly of the State of Maryland, approved May 3rd, 1882, entitled "An act to incorporate the Baltimore and Ohio Employés' Relief Association," the object of the organization of said corporation being, as stated in the first section thereof, to extend relief in case of sickness, injury, old age, and death to the employés of the Baltimore and Ohio Railroad Company and their families; to receive deposits on interest from said employés and their wives, and to loan money at lawful rates of interest in order to provide them with or to improve their homesteads, and generally to provide for their welfare. It is also provided in said section that it should be a condition precedent to the making of any engagements by said association that the directors of the Baltimore and Ohio Railroad Company should by resolution guarantee the faithful performance of the obligations of the association, and that said corporation should make no contracts beyond such guaranty or after the repeal of the resolution authorizing the same.

And the said defendant further says that in pursuance of the provisions of said act so incorporating said relief association the board of directors of said Baltimore and Ohio Railroad Company did enter upon its journal an order guaranteeing all of the contracts of said relief association; and it was further provided that such corporation had the power to make such rules and regulations not incon-

sistent with said act, provided such rules and regulations were first approved by the Baltimore and Ohio Railroad Company; that certain rules and regulations were so made by said relief association and were afterwards approved by the said Baltimore and Ohio Railroad Company; that among the rules and regulations so made by said relief association was article third, which provided, among other things, that as it was not contemplated in the scheme therein provided to give double benefits, that the members, on receiving the benefits therein provided for as compensation for injuries received or sickness incurred while in the service of said railroad company, should execute and deliver to the said relief association and to the said railroad company a release satisfactory to them, releasing the said railroad company from all claims for damages by reason of such accident causing such injuries, signed by all persons claiming title thereto.

And the said defendant further says that at the time the said plaintiff entered its service, to wit, on the 8th day of February, 1881, he prepared and addressed to the secretary of the said Baltimore and Ohio Employes' Relief Association, which was then an unincorporated society, but afterwards incorporated by the act of the General Assembly of the State of Maryland, as hereinbefore averred, an application to become a member thereof; that in said application the said William Sutherland stated that he resided at Chicago Junction, in the county of Huron, State of Ohio, and that he was aged — years, and that he was employed as laborer in the machinery department of the Baltimore and Ohio Railroad Company, and that by reason of such employment he applied to become a member of the Baltimore and Ohio Employes' Relief Association, and further stating that he consented to conform to and be bound by the constitution and by-laws, rules and regulations of said association then in force or recognized by the same, and also to conform to and be bound by such additional by-laws, rules and regulations as might thereafter be adopted by its committee of management in accordance with the provisions of its constitution; and the said plaintiff in his said application further proposed and authorized the agents of the said Baltimore and Ohio Railroad Company to deduct, in advance, from his wages seventy-five cents per month, which deduction he authorized and directed the said Baltimare and Ohio Railroad Company to make, and to credit the same to the said relief association, in order to secure to himself or, in case of his death, to his next of kin, under the laws of the State of Maryland governing the distribution of the personal estate of persons dying intestate, the benefits secured by said by-laws, rules, and regulations to the lowest class of contributors to the relief fund of said association, subject as to the payment thereof to all the provisions and requirements of said constitution, by-laws, rules, and regulations; and the said plaintiff further agreed that his application, when approved by the secretary of said association, should constitute a contract between himself and the said Baltimore and Ohio Railroad Company and the said Baltimore and Ohio Employés' Relief Associations as a condition of his employ-

ment by said railroad company, and that when so approved it should likewise constitute an assignment in advance to the Baltimore and Ohio Employés' Relief Association of such portion of his wages, and which should have precedence over all other assignments.

And the said defendant further says that in his said application the said plaintiff agreed that in consideration of the contribution of the Baltimore and Ohio Railroad Company to said association and of the guaranty of said railroad company of the payments of the benefits aforesaid the said railroad company should not be liable to any claim or suit by reason of any accident happening to the said plaintiff while employed in any manner in the service of said company, whether said accident be caused by the negligence of said company, its officers or agents, or otherwise, except as a guarantor of the benefits payable to him or his beneficiary under the terms of his said application and agreement, and the said Baltimore and Ohio Employés' Relief Association having accepted the said application of the said plaintiff, the same became and was a contract between the plaintiff, the Baltimore and Ohio Railroad Company and the Baltimore and Ohio Employés' Relief Association, and under the terms of which contract the said plaintiff entered the employ of said defendant, and all of the services that he performed were performed in pursuance of the said contract, and whatever the said plaintiff is entitled to recover by reason of the said accident and the injuries thereby received he is entitled to recover under the said contract and not otherwise; and the defendant further says that the application so made by the said plaintiff was forwarded by him and delivered to the secretary of said association in the city of Baltimore and State of Maryland, and was by the said secretary then and there accepted as a contract between the plaintiff, the Baltimore and Ohio Employés Relief Association and the Baltimore and Ohio Railroad Company, and the same then and there became a contract executed by the said three parties aforesaid in the city of Baltimore and State of Maryland, at which place all of the terms of the same were to be performed and executed, and which said contract under the statutes and laws of the State of Maryland was valid and binding on all of said parties.

And the defendant further says that under the constitution and by-laws, rules, and regulations of the said Baltimore and Ohio Employés' Relief Association provisions were made for compensating the said plaintiff for injuries received in accidents of any and all kinds, whether caused by the negligence of the said Baltimore and Ohio Railroad Company, its agents, servants, and employés (including the division upon which the plaintiff was employed), or otherwise, and also for the payment of benefits to the said plaintiff in cases of disease or sickness from causes other than accidents received on said railroad; and the said plaintiff, in said application agreeing to be governed by said rules and regulations, by-laws, etc., of the said association, agreed to accept the manner of compensation therein provided for any injuries he might receive while in the

service of the said railroad company, whether by negligence or otherwise.

And this defendant says that the said Baltimore and Ohio Employés' Relief Association and the said The Baltimore and Ohio Railroad Company have each and both offered to compensate the plaintiff and have compensated him, so far as furnishing him medical and surgical attention, and by accepting the same the said plaintiff affirmed said contract and agreed to accept the provisions thereof in lieu of his action for damages.

F. D. GUNSAULUS,
J. H. COLLINS,
Attorneys for Defendant.

(Verification attached.)

Reply.

(Filed November 29, 1890.)

Now comes the said plaintiff and for his reply to the second defense in said answer stated says:

First. That it is not true and he denies that at the time of his said injury he was a member of said alleged insurance company or association or was in any manner bound by its rules and regulations.

Second. This plaintiff further denies that at the time he was suffering from said injuries he knew or believed or had any reason to believe that he was being attended by surgeons employed therefor by said alleged insurance association, or that such surgeons were so employed as alleged in said answer.

Thirdly. The plaintiff further says he has no sufficient knowledge or means of information of the organization, existence, or objects of said alleged insurance association to form a judgment or opinion thereof, and he therefore denies each and all allegations of said answer regarding the same and of this plaintiff's connection therewith, and further denies that he ever received therefrom any of said alleged benefits.

Fourth. This plaintiff further says that it is not true and he denies that said alleged insurance does or could in any respect operate as an estoppel or abridge his right to recover in this action his damages as alleged in his petition herein.

WARREN SEVERANCE,
G. R. WALKER, AND
JOHN H. DOYLE,
Plaintiff's Attorneys.

(Verification attached.)

Certified Copy of Order for Removal.

(Filed Dec. 5, 1890.)

THE UNITED STATES OF AMERICA, } 88:
Northern District of Ohio, West. Div., }

At a stated term of the circuit court of the United States within and for the western division of the northern district of Ohio, begun and held at the city of Toledo, in said district, on the first Tuesday in December, being the second day of said month, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fifteenth—present, the Honorable Augustus J. Ricks, district judge—among the proceedings then and there had were the following, to wit:

WILLIAM SUTHERLAND
v.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

THURSDAY, *Dec. 4th.*

This day came the defendant, by its counsel, and having filed its petition, affidavit, and bond for the removal of this case from the common pleas court of Huron county, Ohio, and it appearing to the court that the said petition and affidavit *is* in accordance with the 2nd section of an act of Congress approved March 3, 1887, entitled "An act to determine the jurisdiction of the circuit courts and to regulate the removal of causes from the State courts," from which it appears that said petition and affidavit *is* in conformity to law and said bond is sufficient, it is ordered that said cause be docketed in this court.

(Certificate of clerk of U. S. court attached.)

Certified Copy of Order to Remand.

(Filed Jan. 11, 1893.)

THE UNITED STATES OF AMERICA, } 88:
Northern District of Ohio, West. Div., }

At a stated term of the circuit court of the United States within and for the western division of the northern district of Ohio, begun and held at the city of Toledo, in said district, on the first Tuesday in December, being the 6th day of said month, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States of America one hundred and seventeenth—present, the Honorable Augustus J. Ricks, district judge—among the proceedings then and there had were the following, to wit:

WILLIAM SUTHERLAND
v.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

WEDNESDAY, *January 4th*, 1893.

This day came the parties, by their attorneys, and thereupon this cause came on to be heard upon the motion of plaintiff, filed herein September 12, 1891, praying for an order for the remanding of this cause to the court of common pleas of Huron county, Ohio, for the reasons:

1. That this court is without jurisdiction to hear and determine the controversy between the parties.

2. That there exists no such prejudicial or local influence in the court of common pleas of said Huron county, Ohio, from whence it was removed to this court, or in any other State court to which defendant might, under the laws of Ohio, have the right to remove this cause, to prevent defendant from attaining justice in said State court or courts.

3. Because the petition for removal and affidavit in support thereof are not sufficient in law to cause the removal of said cause.

And said motion was argued by counsel. On consideration whereof the court do overrule said motion upon each and every ground therein stated. To the opinion of the court in so overruling said motion of September 12, 1891, plaintiff by his attorneys excepts.

And thereupon this cause came on further to be heard upon the additional motion to remand this cause to said court of common pleas of Huron county, Ohio, filed herein June 6, 1892, for the reasons following:

First. Because said cause is not removable, and this court is without jurisdiction to hear the same.

Second. Because said proceedings for removal were not taken or filed within the time required by law.

Third. That said petition for removal was not filed within the time provided and authorized by the act of March 3, 1887, corrected by the act of August 13, 1888, as interpreted in Fisk *v.* Henarie, 142 U. S., 459.

On consideration whereof the court do overrule the first and second gro-nds of said motion, and do allow said motion on the third ground thereof, to wit, for the reason that the petition for removal was not filed within the time prescribed by statute.

It is therefore ordered and adjudged that this cause be, and the same hereby is, remanded to the court of common pleas of Huron county, Ohio, from which it was removed to this court, for all proceedings therein.

It is further ordered and adjudged that said defendant pay all the costs of this action in this court herein, taxed at $—.

To the opinion of the court in overruling the first and second grounds of said additional motion to remand plaintiff, by his attorney, excepts, and to the opinion of the court in sustaining said motion to remand for the reasons stated the defendant, by its attorney,

excepts, and also excepts to the order remanding said cause, and to the judgment for costs.

(Certificate of clerk of U. S. court attached.)

Verdict.

(Filed November 15, 1893.)

THE STATE OF OHIO, }
Huron County. }

Court of Common Pleas of said County, October Term, 1893.

WILLIAM SUTHERLAND, Plaintiff, } Civil Action. Verdict
v. for Plaintiff.
THE B. & O. R. R. Co., Defendant. }

We, the jury, being duly impaneled and sworn, find the issues in this cause in favor of the plaintiff and assess the amount due to the plaintiff from the defendant at the sum of $10,000.

J. D. WHITNEY, *Foreman.*

Motion for New Trial.

(Filed Nov. 15, 1893.)

Now comes the defendant, The Baltimore and Ohio Railroad Company, and moves the court for a new trial in this case upon the grounds following, to wit:

1. The court admitted evidence objected to by the defendant.
2. The court allowed the plaintiff and plaintiff's witnesses to illustrate their testimony by using a toy engine and a pretended model of coal chute which were not accurate or in proper proportion.
3. The court excluded testimony offered by the defendant.
4. The court erred in refusing to give to the jury each of the several charges asked by the defendant.
5. The court erred in the charge as given, excepted to at the time by the defendant.

The verdict is not sustained by sufficient evidence and is contrary to law.

J. H. COLLINS,
Attorney for Defendant.

In Huron Co. Circuit Court.

Petition in Error.

(Filed Feb. 15, 1894.)

In the Circuit Court of Huron County, Ohio.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff in Error,
against
WILLIAM SUTHERLAND, Defendant in Error.
} Petition in Error.

The said plaintiff in error, The Baltimore and Ohio Railroad Company, attaches hereto a certified copy of the docket and journal entries in the case of William Sutherland, the defendant in error, against The Baltimore and Ohio Railroad Company, the plaintiff in error, lately pending in the court of common pleas of Huron county, and the original papers in said cause are herewith filed.

And the said plaintiff in error here shows to the court that in the record of the proceedings and judgment of said court of common pleas in said cause there is manifest error in this, to wit:

First. Said court had no jurisdiction over said cause of action at the time of the trial thereof, the same having been removed to the circuit court of the United States for the western division of the northern district of Ohio, said court then having the jurisdiction thereof, and the same never having been legally remanded to said court of common pleas.

Second. Said court erred in overruling the objections of the defendant therein to evidence offered by the plaintiff, William Sutherland; which evidence was prejudicial to the said defendant in said suit.

Third. Said court erred in sustaining objections by the plaintiff in said suit to evidence offered by the defendant therein; which ruling was excepted to by the said defendant and was prejudicial to it.

Fourth. Said court erred in refusing to give to the jury the first charge asked by the defendant in said suit.

Fifth. Said court erred in refusing to give to the jury the second charge asked by the defendant in said suit.

Sixth. Said court erred in refusing to give to the jury the fourth charge asked by the defendant in said suit.

Seventh. Said court erred in refusing to give to the jury the fifth charge asked by the defendant in said suit.

Eighth. Said court erred in refusing to give to the jury the sixth charge asked by the defendant in said suit.

Ninth. Said court erred in refusing to give to the jury the ninth charge asked by the defendant in said suit.

Tenth. Said court erred in refusing to give to the jury the tenth charge asked by the defendant in said suit.

Eleventh. Said court erred in overruling the motion of the defendant in said suit for a new trial.

Whereupon the said plaintiff in error asks that the said judgment of the said court of common pleas be reversed and held for naught.

J. H. COLLINS,
Attorney for Plaintiff in Error.

To the clerk:

Issue summons in error to the sheriff of Huron county, Ohio, returnable according to law.

J. H. COLLINS,
Attorney for Plaintiff in Error.

Certificate of Journal Entries in the Court of Common Pleas.

(Filed in circuit court Feb. 15, 1894.)

THE STATE OF OHIO, } ss:
Huron County, }

WILLIAM SUTHERLAND, Plaintiff,
v.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

I, R. K. Rood, clerk of the court of common pleas within and for the county of Huron, do hereby certify that the following entries and judgment are truly copied from the *the* journals of said court, to wit:

Nov. term, to wit, Nov. 13, 1892.—This day came the parties and this cause was submitted to the court on the petition of the said defendant to remove this action to the circuit court of the United States for the northern district of Ohio, western division, and the court finding that the plaintiff herein is a citizen of the State of Ohio and the said defendant is a citizen of the State of Maryland, and that there is a controversy herein between citizens of different States, and, further, that the matter in dispute herein exceeds, exclusive of costs, the sum of five hundred dollars, and the defendant has filed herein its petition, with bond, as required by law, for the removal of this action to the said circuit court of the United States, which petition and bond were filed before the present term of this court, this being the term at which said action could first be tried and before the trial thereof—

It is therefore ordered that the said petition and bond be, and the same are, hereby accepted, and the clerk of this court is ordered, on request of the defendant, to make a certified copy of the record of this cause for filing in the circuit court of the United States; to which ruling and order of this court the plaintiff, by his counsel, excepts.

From November term, 1882, to November term, 1890, this case was off the docket—pending in the United States courts.

Nov. term, to wit, Nov. 19, 1890.—On application of the defendant it has leave to answer instanter, and on application of the plaintiff he has leave to reply at rules.

Thereupon this cause came on to be heard on the application of the defendant for a continuance of this action, and was argued by counsel. On consideration whereof the court refused said application; to which ruling counsel for the defendant excepts.

Nov. term, to wit, Dec. 19, 1890.—This case having been set down for trial in the United States circuit court for the western division of Ohio, the court orders the said *same* transferred to said court; to which ruling the plaintiff objected and excepted.

Nov. term, 1892, to wit, Jan. 14, 1893.—This cause came on to be heard on the motion of the plaintiff for leave to file amended petition. On consideration whereof the court allowed said motion, and he has leave to file the same in ten days.

Feb. term, to wit, March 3, 1893.—By consent of parties this cause is continued.

May term, 1893.—Continued under general order.

Oct. term, to wit, Nov. 13, 1893.—This day came the parties, by their attorneys; also came the following-named persons as jurors, to wit, Geo. Seidell, Aro Carpenter, James Truxel, George Messig, Martin Sattig, J. D. Whitney, C. W. Mead, E. Rose, Will Cook, John Wolf, Charles Sanders, and John Yingling, who were duly impanelled and sworn according to law; and thereupon this cause came on to be heard upon the pleadings and evidence.

Oct. term, to wit, Nov. 15, 1893.—This day again came the said parties, by their attorneys, and also came the jury heretofore impanelled and sworn, and the trial proceeded; and the said jury having heard the remaining testimony, the argument, and charge of the court, retired to their room in charge of the court bailiff for deliberation.

And now come said jury into open court with their verdict in writing, signed by their foreman, and say:

"We, the jury, being duly impanelled and sworn, find the issues in this case in favor of the plaintiff, and assess the amount due to the plaintiff from the defendant at the sum of $10,000.00.

J. D. WHITNEY, *Foreman.*"

Oct term, 1893, to wit, Jan. 6, 1894.—This day came the parties, by their attorneys, and thereupon this cause came on to be heard on the motion of the defendant for a new trial and was argued by counsel.

On consideration thereof the court overruled said motion; to which ruling of the court the defendant, by its counsel, at the time excepted.

And now come said jury into open court with their verdict in writing, signed by their foreman, and say: "We the jury being duly impanelled and sworn, find the issues in this case in favor of the plaintiff, and assess the amount due to the plaintiff from the defendant at the sum of $10,000.00. J. D. Whitney, *Foreman.*"

OCT. TERM, 1893, to-wit: *Jan. 6, 1894.*—This day came the parties by their attorneys, and thereupon this cause came on to be heard on the motion of the defendant for a new trial, and was argued by counsel.

On consideration whereof, the court overruled said motion, to which ruling of the court, the defendant, by its counsel, at the time excepted.

Thereupon came the defendant and presented to the court its bill of exceptions taken on the trial of this cause, the same having previously been submitted to counsel for the plaintiff as required by law, which said bill of exceptions being examined and found to be correct, is allowed, signed and sealed by the court, and ordered to be made a part of the record in this case.

Thereupon this cause came on further to be heard on the verdict of the jury heretofore rendered in this case, and it is considered by the court that the said plaintiff recover of the said defendant, the said sum of Ten Thousand Dollars, together with his costs in this behalf expended.

(Certificate of Clerk attached.)

BILL OF EXCEPTIONS.

State of Ohio, Huron County Court of Common Pleas:

WILLIAM SUTHERLAND, *Plaintiff*, v. THE BALTIMORE AND OHIO RAILROAD COMPANY, *Defendant.*

Be it remembered that on the trial of this cause at the October Term, 1893, of the Court of Common Pleas, within and for Huron county, Ohio, before the Hon. J. L. GREENE, Judge, and a jury, the plaintiff, to maintain the issues upon his part, called the following witnesses and introduced the following evidence, to-wit:

PLAINTIFF'S TESTIMONY.

WILLIAM SUTHERLAND,

plaintiff, being duly sworn, testified as follows:

Direct Examination, by Mr. Walker.

Q. You are the plaintiff here, are you? A. Yes, sir.

Q. In 1882, where did you reside? A. Chicago Junction.

Q. You may tell the jury what, if any, engagement you made with the Baltimore & Ohio Railroad Company, or whether you made any engagement to work for the company.

Mr. Collins—It is admitted that he was in the employ, and what it was. The petition avers it and we admit it.

Mr. Walker—It will do no harm for him to state it.

Court—I think he may testify as to what his employment was.

Q. State if you were in the employ of the company? A. Yes, sir.

Q. Who employed you? A. Mr. Gunther.

Q. Who was Mr. Gunther? A. He was called the Master Mechanic of the shops.

Q. He was what? A. Called Master Mechanic of the shops.

Q. What shops? A. The shops at Chicago Junction.

Q. What shops had the company there? A. Well, they were called the Western Division.

Q. Just tell what the company had there? A. They had a machine shop, a round house, coal chutes—

Q. Coal chutes? A. Yes, sir.

Q. You may describe to the jury a coal chute. Tell how it was built. A. It was built of very heavy timber and about thirty feet high, as near as I could judge.

Q. Thirty feet high? A. Yes, sir. It was made of very heavy material.

Q. Describe any places of deposit for coal that were at the top of it. A. Well, the cars was run up on to the top—

Q. How? A. The cars with the coal was run up on to the top of the chute, and it was put in pockets from the top of the chutes, into those pockets.

Q. About what amount of coal would each pocket hold? A. Well, I think they would hold about fifty bushels.

Q. State if it was about enough to supply an engine that was empty? A. Well, I think there would be sufficient coal, but they very seldom come in empty, you know.

Q. Well, I am just getting at it in a general way, for description. A. About on an average, one pocket.

Q. How was the bottom of the pocket formed and shaped? A. It was a very steep grade, you know, and then there was a small door at the—

Q. Plank bottom? A. Yes, sir.

Q. And at the track, was it the highest there? A. No, sir, the lower side; the coal approached to the track from the pocket.

Q. I speak of the track on top of the coal chute? A. It was higher.

Q. That was the highest point? A. Yes, sir.

Q. And slanted down? A. And slanted down very steep.

Q. About how many pockets were there on each side of that coal chute? A. At the time I worked there I cannot say positively, but I think there was thirteen.

Q. Thirteeen? A. I think it was thirteen, but they have added more to it since.

Q. Then how were these pockets filled? A. They were filled from above.

Q. From the cars? A. From the cars; yes, sir.

Q. About how wide was each pocket? A. Well, they was very near as wide as a tender on an engine. I cannot say exactly how many feet.

Q. Six, eight or ten feet? A. Probably eight feet anyway.

Q. What was the shape of it down at the bottom or outside where there is a trap-door? A. Well, there was a small

trap-door that we had to lower. When we pulled the apron down we had to pull a lever down underneath of it in order to let the coal come down.

Q. Where was the lever? A. Underneath the apron.

Mr. Walker to Mr. Collins—Do you still object to the use of this model (coal chute)?

Mr. Collins—Yes, sir; because it does not correctly represent it.

Court—We will admit that for the present, unless there is some testimony to show that it does not fairly represent it.

A. *Witness*—It represents it all right enough.

Mr. Walker—Q. You may tell the jury whether that model fairly represents a coal chute?

A. Yes, sir; it represents it as near as you can get anything to do it.

Q. It does? A. Yes, sir; you cannot get anything nearer, only it is small.

Q. Have you got a model engine here? A. Yes, sir; I have got it in the hall.

Q. I propose to have it brought in and show its connection with the coal chute.

(The defendant, by its attorney, at the time objected to the use of the models; objection overruled; to which ruling the defendant, by its attorney, at the time excepted. Which models are herewith filed, marked Exhibit "A," and Exhibit "B.")

Q. Mr. Sutherland, you may now describe the engine. Just step here and describe it, bringing the model with you. You may tell the jury what sort of an engine the one that did the mischief in this case was? A. It was called a mogul engine, a consolidated engine. It was a good deal like this one, only the boiler projected out to the front of the cab here.

Q. Projected out further? A. No, just even.

Q. Further than this one? A. Yes, further than this. The difference was that the boiler projected further in the cab; all the difference was in the boiler.

Q. What difference, if any, was there in reference to the tender of the engine? A. There was none.

Q. Then you may confine yourself in describing it in connection with the tender. Show how it worked. A. When we give coal to these engines, we have got to pull this apron down in this manner (indicating on model). Then we have got to lower a little lever that holds the pocket, here—a pin—and we take and lower this lever and the heft of the coal throws this open in this manner.

Q. If the jurors will rise up they can see that plainer. Just show how that apron drops there into the tender? A. Well, this is the way it drops into the tender when we give it coal, and then after the coal is given, we have to close this little door back to its proper place, and put this lever up to hold that, and then we raise this apron.

Q. Would it be necessary to clean out the coal and dust so as to let that trap-door back? A. I had to get up there and clean this out.

Q. What did you rest upon; what did you stand upon? A. This apron.

Q. What part of the apron? A. The lower part of the apron.

Q. Is there a bar there? A. There is a cross-bar in there.

Q. Is that shown on that model, point it out? A. Yes, sir.

Q. Point it out? A. I had one foot on this bar (indicating on model).

Q. Which foot? A. My left foot.

Q. Where was your right leg then? A. It was hanging loose right close by it, but it was not resting on the apron.

Q. Was there anything for your right leg or foot to rest upon? A. No, sir.

Q. You were then bearing your weight upon the left foot? A. Yes, sir.

Q. What were you doing with your hands? A. Cleaning this out.

Q. Had you got that done? A. Not quite; I was just in the act of closing that.

Q. When they struck you. You may describe now the whole operation of how the injury occurred. A. Well, while I was closing this door my back was turned to this engine I was off the engine and could not feel it move. My lantern was sitting behind me on the top of the cab here, and while I was closing this little door the engineer moved this engine unbeknownst to me, and he caught my leg betwixt this apron and the top of this cab.

Q. Now you may reverse that and place it around to show your left leg? A. The engine was headed towards the east.

Q. And your left foot was on the bar, you say? A. Yes, sir.

Q. And your hands were? A. I had hold of this chain with one and was cleaning with the left hand.

Q. Did you say these were chains? A. Yes, sir.

Q. And you had hold of one of these with your right hand? A. Yes, sir.

Q. And cleaning out here to move this trap-door back? A. To get this back.

Q. Just point where your right leg was when it was caught? A. It was hanging about here on this apron; just like a person would stand.

Q. Underneath the apron, what was there in the shape of a tool box, and forward of it? A. There was a tool box on the front here. I stepped off the tool box on to the apron.

Q. State if you could stand on the tool box and reach the groove here where the trap-door was? A. No, sir; you cannot.

Q. Was there any other place or position in which you could place yourself to clean out that groove here into which

this little trap door shut? A. No, sir; you had to get up here.

Q. Did you give any signal or direction for the engineer to move the engine when you were hurt? A. No, sir; no person give any. There was no such signal.

Q. Had you any knowledge that the engineer was about to move the engine? A. No, sir; I was innocent.

Q. You did not know it? A. No, sir; until I was caught, and I hollered for him to reverse the engine and let me loose, and go ahead.

Q. Where was Mr. Moore at the time? A. He was on the top of those chutes.

Q. Who was on the engine, if anybody? A. Edward Lewis was hostler.

Q. Anybody else? A. No, sir; not in my presence.

Q. Edward Lewis was the hostler, you say? A. There was a man come there after I was hurt, but he was not there at the time of the accident.

Q. Mr. Sutherland, who was Edward Lewis? What did he have to do there? A. Why, Mr. Gunther told me he was a hostler.

(To which answer defendant objected. Objection sustained.)

Q. State what his capacity was; Edward Lewis's? A. He was called a hostler; to handle those engines.

Q. He acted in that capacity? A. Yes, sir.

Q. I will ask you when you were employed by that company? A. I was employed in 1882; January, 1882.

Q. What time did you go to work? A. On the 16th of January.

Q. You may tell the jury now—well, you have told what Mr. Gunther's capacity was, what his position was, Master Mechanic? A. Yes, sir; Master Mechanic.

Q. You may state what, if any, authority Mr. Gunther had there over the shops, and the men in their employ.

(To which question the defendant objected. Objection sustained, for the reason that it is admitted by counsel, if not

by the pleadings, that Mr. Gunther was Master Mechanic of the shops, and that he employed the plaintiff.)

Q. You may tell the jury what was said between yourself and Mr. Gunther in the way of your employment; just go on and state the interview. I asked Mr. Gunther for employment, and he told me that he could give it to me at the coal chutes.

(The defendant objected to the witness stating what Mr. Gunther said to him. Objection overruled; to which ruling of the court the defendant, by its counsel, at the time excepted.)

(The defendant, by its counsel, admitted that Mr. Gunther was the Master Mechanic and hired the men, but stated that he hired them and discharged them only as the Superintendent of Motive Power gave him authority to do so. The court again overruled the objection to the last question; to which ruling of the court the defendant, by its counsel, at the time excepted.)

Mr. Walker—Q. You begun answering the question by stating that you applied for a job. I wish you would speak louder. A. I asked Mr. Gunther for employment, and he told me that he could give me employment at the coal chutes. He told me that Edward Lewis was the hostler; that he would instruct me about this work, and that I would work under his instructions at the chutes.

Q. What, if anything, did he say about your obeying him? A. He said that I would give the supplies under his orders, obey him.

Q. Obey his orders? A. Yes, sir.

Q. What else was said, if anything, in that interview, in regard to Mr. Brubaker? A. He told me that Mr. Lewis was off duty at the present time; that he had talked to him about hiring me. Mr. Lewis was off at that time, and Mr. Brubaker was acting hostler in his place; that he had had his arm vaccinated and was off duty, but providing Mr. Lewis was not there, I was to go there and work under Mr. Brubaker until Mr. Lewis would come, under his instructions at these coal chutes.

Q. How long did you work under Brubaker? A. It was a very few nights. Something less than a week; I cannot say positively.

Q. What night of January, 1882, did you go there? A. On the 16th of January.

Q. By the way, had Lewis taken his place before this injury? A. Yes, sir; he had taken it several nights before this.

Q. About how long before? A. While I was there, Brubaker had worked somewheres in the neighborhood of a week, and from that time Mr. Lewis handled the engines.

Q. When did this injury take place? A. It took place on the 31st; on the morning of the 31st, or midnight, betwixt one and two, as near as I can tell, when I was injured.

Q. You say Lewis was then in charge of the engine? A. Yes, sir; he had charge of the engine.

Q. How many engines had you dealt with that night before this injury occurred? A. Well, I cannot say positively, but we had taken in somewheres in the neighborhood of eight or nine. We had been working right along that evening.

Q. And about what time did this occur? A. It was very near two o'clock, as near as I can tell.

Q. Very near two o'clock? A. Yes, sir; we had eat our supper, and it was after that.

Q. After you were injured, you may tell the jury what occurred? A. After I had got released from the way he held me?

Q. Yes; you may tell the jury right from that point where you were crushed, what, if anything, you said; go on and describe it. A. I hollered for him to reverse the engine, go ahead, and let me loose. I then got down off the apron and sat on the end-gate, and I told him to cut or pull my boot off, and Mr. Lewis pulled my boot off. There was nothing said; I did not say anything; I got kind of faint and I kind of leaned over—

Q. Where was you when the boot was pulled off? A. I was sitting at the end of the coal gate on the tender.

Q. What was done with you then? A. They had taken me to the round-house, and carried me off the tender, and put me on little trucks and had taken me home on these trucks.

Q. Now, Mr. Sutherland, I am requested to be a little fuller in the description. What was that apron that dropped down there made of? A. It was made of heavy plank. I could not just say positive the timber, but it was hard wood timber, heavy.

Q. About how large was it? A. Well it must have been six to eight feet—about six feet, as near as I could tell, across it, and probably eight feet long.

Q. About six feet wide and eight feet long, more or less. A. As near as I could tell.

Q. On the edges, what did it have there? A. Had heavy plank on the edges of it.

Q. Forming the comb here? A. Yes, sir; on the sides.

Q. About how wide were those pieces that form the edge of the apron? A. I should judge about eight inches wide, on the sides.

Q. You refer to these pieces (indicating on model)? A. Yes, sir; on the sides there.

Q. How thick were they? A. Well, they were heavy plank. I could not say just positive. They must have been over two inches, or two inches anyway.

Q. Now, from the edge of the apron to the front or to the back of the cab, how much space is there? A. Betwixt the apron and the cab?

Q. Yes. A. About three feet, as near as I could judge.

Q. About three feet? A. Yes, sir.

Q. Then he moved the engine back—How far would it have to go before it would catch your leg? A. It would have to go three feet.

Q. If that was three feet space— A. It was in that neighborhood; two and a half to three feet.

Q. When you were hurt, were you touching the engine?

A. No, sir; I was off the engine; off the tender, and never felt the motion.

Q. You were resting wholly on this apron? A. Yes, sir; I had all my heft and weight on the apron.

Q. Did you know that the engine was moving until you was caught? A. No, sir; I did not know it until I was caught.

Q. How? A. No, sir; I never knew it until I was caught. If I had, I would not have staid there; I would have been away.

Q. You would have got out of there? A. Yes, sir; any man would.

Q. Now, Mr. Sutherland, when you were taken back, if you were taken to your house, what condition did you find yourself in? A. Well, I was in a very bad condition. A man with a leg mangled—

Q. Suffer any pain? A. Yes, sir.

Q. To what extent? A. Well, it was to a good deal of extent. I could not just say positive, because a person in that condition—

Q. What was the condition of your leg as to crushing? A. It was mangled so that when they pulled my boot off I could feel my leg shake. The bones were all crushed and broke.

Q. Was it a simple break, or were the bones crushed? A. The bones were crushed.

Q. Did that involve the joint of the knee? A. It was below the joint, and the physicians say it was splintered up to the knee.

Q. Splintered the bones into the knee-joint? A. That is what the physicians say.

Q. Well, was amputation made of the leg? A. Well, not right away.

Q. What was done? A. The physicians come there the next morning and pronounced the limb would have to come off, but I objected and told them to come back the next day. I thought it was probable they would counsel different and

save my limb. And they come back the next day, and said that they could not save it; that it would have to be amputated, and the next morning about ten o'clock they amputated the leg.

Q. Mr. Sutherland, you may go on and describe what you went through with? A. Well, I suffered a great deal. I had abscesses form, through a clot of blood, as the physicians told me.

Q. How? A. I had abscesses form; it was pretty near the same as blood-poisoning, I guess.

Q. Just describe those. A. There was one formed on my hip here that has left a large scar there, and the medicine would come through underneath to the end of the stub of the leg. This one was, I should judge, two months and a half discharging, and this one on the inside of the leg was not so bad. They put a pipe in that that caused me a great deal of misery and suffering.

Q. What was the result and effect before a cure was effected as to a callous on the hip? A. The hip is calloused now. It is all wasted and calloused here at the present time.

Q. Was it so immediately after the injury became healed? A. It started forming a few days after they amputated my leg, and it was several days before it broke. I could not say positively how many days.

Q. How long were you confined to your bed? A. About two months, as near as I could tell.

Q. Then how long were you before you could get about? A. Well, I did not get out of doors until somewhere along about the first of May, on crutches.

Q. How did you go about then? A. I went on crutches in the house. I was very weak and could not go out until I gained some strength.

Q. How long did you remain on crutches? A. Until August the following summer; the latter part, I think it was, of August.

Q. Did you get an artifical limb then? A. Yes, sir.

Q. What has been the situation since then as to wearing the limb or being able to? A. I have worn the limb ever since, only from one accident. I fell about a year ago, through this artificial limb, and broke my limb, right in the hip here, about a year ago, and I was laid up then about eight weeks. It was caused by this artificial limb. I slipped on the sidewalk and fell.

Q. By reason of your having the artificial limb? A. Yes, sir.

(To which question the defendant objected. Objection sustained.)

Q. You may state what the fact was as to there being festers arising from time to time that prevented your wearing it. A. At first there was. The first three or four years, probably five years, there would form little festers or little small boils like.

Q. Where were they located? A. Along on the thigh here mostly.

Q. How was it about the end of the stump becoming irritated? A. Well, it did become irritated at times, but never so bad as it was at the thigh.

Q. How? A. At times it did become irritated right at the bottom of the stump, at the lower part, but never as bad as it was at the top.

Q. How long did that irritation continue? A. From four to six or eight days. Some times I would have my leg off for three or four days, and go on crutches again.

Q. And that troubled you for four or five years? A. Yes, sir.

Q. Where was it amputated? A. It is amputated above the knee about five inches.

Q. Just indicate. A. The amputation is just about here (indicating.) This is artificial all the way up to that.

Q. I will ask you now what it was that crushed your leg? A. It was crushed by the top of the cab of that locomotive.

Q. By the top of the cab? A. Yes, sir.

Q. And against what? A. Against the apron of the coal chute.

Q. Your leg being between them? A. Yes, sir.

Q. You may state who had charge at that moment of that engine. A. Edward Lewis had charge of it.

Q. And you have stated that you gave no signal to go ahead? A. No signal. No person gave him a signal.

Q. What was his duty in that matter? Just tell the jury, in that connection? A. His duty was to see that the locomotives were properly cared for—

(To which question the defendant objected.)

Court—The form is objectionable.

Mr. Walker—Q. Have you any knowledge of what the duty of that hostler was as to handling that engine? A. He had to handle that engine—

Mr. Collins—We want to know how you know, first.

Mr. Walker—Q. You may state to the jury what Mr. Gunther said to you in regard to the duty of the hostler.

(To which question the defendant objected.)

Q. What, if anything, did Mr. Gunther say to you before you went to work in reference to the duties of the hostler?

(To which question the defendant objected. Objection overruled. To which ruling of the court, the defendant, by its counsel at the time excepted.)

A. He told me that the hostler had full charge of these engines as they came in off the road.

Q. State if he told you who the hostler was? A. Yes, sir; he told me that it was Edward Lewis; he was the hostler.

Q. Now, what was the duty, if you know, of Edward Lewis in connection with that engine at the time that you were injured? A. He was to move that engine and give it the necessary supplies.

Q. Just go on. A. And to deliver the engine into the round-house.

Q. Now, you may tell the jury where he took charge of this engine. A. He took it below the coal chutes. I could not say what number below, and he moved it up to No. 11 pocket.

Q. Where had the engine been? Where had it come from? A. From the west.

Q. On the main track? A. It came in on the main track, and the engineer run it on the side track and stepped off, and then he took charge of it.

Q. Who had charge, if anybody, of the men doing that work there?

Court—If you know.

(To which question the defendant objected; objection overruled; to which ruling of the court the defendant, by its counsel, at the time excepted.)

A. I was placed there to work under Mr. Lewis through Mr. Gunther.

Q. Whose duty was it to give the orders in the management of that work?

(To which question the defendant objected. Objection overruled; to which ruling of the court the defendant, by its counsel, at the time excepted.)

Q. Now, Mr. Sutherland, you may tell the jury where Mr. Lewis took the engine; where he went and got aboard of it, if at all, and what he did with it. A. He took the engine after the engineer stepped off, and moved it up to No. 11 pocket.

Q. To do that, state if it was necessary, and if he did get aboard the engine and handle the levers? A. Yes, sir; he took full charge of the engine.

Q. And moved it up to No. 11? A. No. 11.

Q. What, if any, directions did he give you? A. He called for coal.

Q. He called for coal? A Yes, sir.

Q. Now, go on and state how the coal was to be got. A. We had to lower the apron just as it stands there at the

present time, and we had to lower a lever underneath that in order to let that little door—

Q. Who had to do that? A. Either Moore or myself, whichever was close to that side of the apron.

Q. Where was Moore at that time? A. He was on top. After we had let the apron down, he had went up to find some more coal.

Q. What was it about there being enough coal in pocket No. 11 to supply that engine? A. There was not enough in that pocket.

Q. How did Moore get up to the top of the coal chute? A. He climbed up one side of the apron.

Q. He climed right up the side? A. Yes, sir; went up in front of the apron.

Q. Where was you when he was climbing up? A. After he had got up off the apron, I set my lantern on the cab of the engine, and stepped off the tool box on to the apron, and was closing this little door—

Q. Where was Lewis? A. Lewis was in the engine, in the cab.

Q. Could you see Lewis from where you were? A. Not at the present time.

Q. Not at that time? A. I turned my back to the engine and had got up off the tool box on to the apron, and my back was to the engine, facing from his face.

Q. State if Lewis could see your feet? A. Yes, he could see me.

Q. Could he see your head, and the principal part of your body? A. I could not say positive about that; but he could see the most part of me.

Q. Could see the lower part of you? A. Yes, sir.

Q. What prevented his seeing your head and arms? A. My body was some above the cab, a part of my body, off on an angle, you know.

Q. How far was Lewis from where your foot rested upon the apron? A. Well, I cannot say just how deep the cab was.

Q. Can you give the— A. Well, it is the neighborhood of eight feet.

Q. Eight feet or such a matter? A. And I was three feet from the top of the cab, as near as I could judge, further back.

Cross-Examination, by Mr. Collins.

Q. I understood you to say that this coal chute was thirty feet high. A. As near as I can judge, the coal chute is.

Q. I mean the coal chute; the coal chute is thirty feet high. A. Yes, sir.

Q. How high is the top of the tender of the engine? A. I never measured it.

Q. Well, about how high? Can you stand on the ground and reach up to this? A. No, sir.

Q. How near can you come to it? A. Well, it is owing to the height of the person, I should think.

Q. If a person was six feet high, could he stand on the ground and reach that? A. I guess they can.

Q. You have got your tender about fifteen feet high, if it is proportioned right. It is about half as high as your thirty foot model? A. To the top of the chute?

Q. Yes, this is about half way. Don't you see if you have your model proportioned right, you have got the tender of the engine about fifteen feet high? That is higher than a freight car, isn't it? A. I did not take the exact height.

Q. Then it is not a model properly at all. Here is the smoke stack, pretty near as high as this thing. Did you ever see a smoke stack thirty feet high, or twenty-five feet high? Did you ever see such a thing? You have got the smoke stack pretty near as high as the model which ought to represent a thing thirty feet high. When you said that that correctly represented a coal chute and this an engine, you were mistaken about that? A. No, sir; that represents it only on a small scale.

Q. But it is not proportioned right? A. It is proportioned—

Q. You did not attempt to proportion it at all, did you? A. No, sir.

Q. And you did not attempt to proportion this door with the other machinery, did you? A. No, sir.

Q. You did not attempt to proportion anything? A. No, sir; I did not.

Q. You simply made something that looked like a coal chute, and something that looked like an engine. A. Yes, sir.

Q. You did not attempt to proportion lengths, or heights or distances? A. Not on that model I did not. That is just aa it is, only it is smaller.

Q. You say you did not proportion the heights or distance or anything; nothing of that kind; you admit that. Don't you know that there is no such pin as that at all in these doors? A. No such pin as that.

Q. Yes, sir. A. There is a pin there but it is heavier.

Q. That sticks out that way? A. There is a projection there where a person sets their foot on.

Q. Don't you know that if you put that there that the end of this comes down inside of the tender about twice as far as you have got it? A. I could not make it to correspond with that engine.

Q. It don't correspond at all, does it, anywhere? Don't you know that if you had been standing on a pin on one of these chutes, you would have been down here and this would have struck some part of your body? A. No, sir; it would not.

Q I will ask you if that is not a photograph of the Chicago Junction coal chutes? A. Yes, sir.

Q. That is a photograph of the Chicago Junction coal chutes and a correct one? A. Yes, sir.

Q. At the end of the trap-door, will you show me where that pin is? A. Here is where it is (indicating on photograph).

Q. If there was a pin in there, how could they shut up

there that way? A. These doors are apart quite a little piece.

Q. Are they there? A. Yes, sir; quite a space there.

Q. I will ask you if that is not a picture not only of a coal chute, but of chute No. 11 with the chute down? A. Yes, sir; that is No. 11.

Q. And with the chute down? A. Yes, sir.

Q. Don't you see where the chute is? It is way down in the tender, and if you had been standing on that pin it would have struck you about the hips? A. That ain't a correct photograph.

Q. But you have already said it was. I will ask you if you have not already said it was a correct photograph of chute No. 11 with the trap-door down, when you described where it would be? A. No, sir; they fixed that picture to suit themselves.

Q. I will ask you if that is not another one with No. 11 down? A. Yes; that is No 11 down.

Q. Now, don't you see where you would be? Suppose you were down on the end of that; where would your body be? A. That don't fall there so low as that.

Q. Suppose that that was in the same condition it was at that time, and this is a photograph with that down. Do you want to correct your testimony? A. That is not a correct photograph at all. When was that taken?

Q. That was taken of No. 11 exactly as it was when you were there? A. I will take the jury to that place, and I could show you—

Q. You have already said, Mr. Sutherland, that you did not attempt to proportion these things at all? A. No, sir; I did not; I did not take no—

Mr. Collins—I suggested that these models ought not to be used.

Court—I think they are competent to go to the jury for what they are worth. This whole matter and that class of testimony may go in under objection. The court will con-

sider that you have made a motion to have it stricken out, and it is overruled, and exception taken by defendant.

Mr. Collins—Q. I will ask you if you did not say that that was a correct photograph? I understood you to say that that was a correct photograph of the coal chutes at Chicago Junction? A. Yes, sir; this is a photograph as it is there.

Q. I will ask you if that does not include pocket No. 11? A. That is No. 11.

Q. What is it you call these things? A. Apron.

Q. You see apron No. 11? A. Yes, sir.

Q. That is the position it would be in if it was up, isn't it? A. Yes; that is the position.

(Photograph marked No. 1 for identification.)

Q. I will ask you if that is not a mogul engine standing in front of those chutes with apron of pocket No. 11 down; isn't that a mogul engine? A. That is not a consolidated engine.

Q. It is not? What is it? A. Ain't no boiler running through that.

Q. I will ask you if that is not a mogul engine? Isn't it just like the one you had, so far as the cab and tender is concerned? A. Yes, sir.

Q. It is precisely like the one you had, so far as the tender and cab is concerned? A. But that apron is not in its proper place.

Q. I am not asking you about that. I asked you if that don't represent the engine with the apron of No. 11 down. You can read the numbers there, can't you? A. Yes, sir.

Q. Now, suppose that it turns out that that apron is just precisely the one that was there when you were there; what have you to say about being down on the lower end of that? A. That person there is standing on the toolbox.

Q. Suppose you had been standing at the end of the apron? A. If I had been on the apron I would have been

higher. I was higher than that man is represented there. I was not as low. He is standing on the tool-box. If I had been standing on the tool-box where that man is standing, he would have caught my body.

Q. If you had been standing on the end of the apron, if you had been standing where you swear you were standing, down on the projection— A. I would have been caught where I was caught, on the limbs. After you raise up off that tool-box, you get up higher; you get up about eighteen or twenty inches.

Q. How long was this apron, Mr Sutherland? A. I cannot just say positive.

Q. About eight feet? A. I should judge from six to eight feet long. I would judge very near eight feet long. From six to eight feet with the projection.

Q. How tall are you? A. About five feet eight.

Q. Will you explain to the jury how you could stand on the lower end of the apron, eight feet long, and reach up with your hands and take the coal out above the apron? A. The cross-piece comes up a piece higher than this represents it.

Q. Will you tell the jury, if this is eight feet long, how you could stand at the end there and reach up eight feet and be taking coal out? A. The cross-piece comes up—you have fully a foot of a raise there.

Q. Suppose you had a foot of a raise, and had to reach seven feet. You would have to lie flat down on the apron? A. No, sir; you lean over.

Q. You put your foot on the projection, and then if you reach seven feet, wouldn't you have to stretch yourself out, and wouldn't it take your whole length and six or eight inches more to reach up to that place? A. On the space where I stood—

Q. If that is as long as you say it is. A. I cannot say positive. It probably is not eight feet long. I would not say. It is from six to eight feet.

Q. What induces you to change your opinion and say it is not eight feet long? A. I did not say positive.

Q. Didn't you say it was about eight feet long? A. I said in the neighborhood; from six to eight feet long.

Q. And that place under the little door is a little above the end of the apron, isn't it? It would be above the end of the apron? A. No, sir; it comes right down to the bottom of the apron.

Q. It is above the apron? A. Just a little; probably an inch or so.

Q. If you were down on the left side—how wide is that? A. I should judge about six feet. They look to be very near square.

Q. If it was six feet long, and you had your foot on the corner of it, where you describe you had, will you tell the jury how you could reach across to that other side? A. You don't have to reach across; you have only to reach to the center of that apron.

Q. How about the other side? A. The pockets are in the center of the chute.

Q. How would you reach across that apron and get to that corner if you were cleaning coal out? A. I was not cleaning from the corner, but at the center.

Q. How would you get up to the center, if you were down here on that end? A. That projection raises you.

Q. You have to get some distance up? A. No, sir.

Q. Didn't you say that pin was down here on the end of the apron? A. No, sir; not positive.

Q. Did you say it at all? A. I said that the cross-piece where my foot was, was some distance from the bottom of the apron, and the pocket is in the center of the apron.

Q. Will you show us any cross-piece at all at the end of the apron, or about the middle of the apron? A. There is no cross-piece on this at all, that I can see. This weight chain is fastened to these pieces here.

Q. You were talking about your being away down here on this end, and reaching up the apron six or eight feet,

cleaning coal out with your hands. A. The trap door is in the center of those.

Q. How high will your arm reach above your head? A. That high (indicating).

Q. About a foot or eighteen inches; you would have to lie flat down to reach, if you were reaching straight up, if it was eight feet? A. How is that?

Q. If you were down on a pin here, and it was eight feet up here— A. You can get up a little distance with the cross-piece.

Q. Suppose it was a foot up there; you would have to lie flat down on the apron to reach the seven feet? A. No, sir.

Q. Suppose you were reaching six feet; you would have to lie flat on the apron? A. You would not have to reach six feet.

Q. This apron is in that shape. Now, you are down here and want to reach up there. Suppose this is only six feet; wouldn't it take the whole length of your body and the length of your arm to put it up there, to reach from the lower end of the six foot apron to the top of it? A. You gain quite a distance—

Q. Suppose that it was six feet; wouldn't it take the whole length of your body? A. Provided you would be right on the end, but I was not right on at the end.

Q. Not at the end? A. Not at the lower part of the chute; I was not.

Q. Didn't you say a while ago that you were? A. I said my foot was on that cross-piece.

Q What is the length from your knee down to your foot? A. I think pretty near two feet.

Q. Where was it that it struck you? A. Caught me right about there (indicating).

Q. Your foot was hanging down at least a foot below the apron? A. It was.

Q. This foot was hanging a foot below the apron? A. Hanging that much below the apron; and the apron was about

eight inches wide, eight or ten inches wide; the sides of the apron. That throws you up higher.

Q. Now, I would like to have you tell the jury, even giving your own measurements, how you could have that foot hanging over that apron, and also this foot? A. While I was reaching—

Q. How can you say that you did that? Don't you know that you were not in that position at all? A. Yes, sir; that was the position I was in.

Q. Don't you know that you were sitting on that cab? A. No, sir; I was not sitting on the cab.

Q. And don't you know that that was just the position you were in? A. No, sir; I was not sitting up there.

Q. This apron upon which you were standing has on each side a side-piece in that shape, don't it? A. Yes, sir.

Q. About a foot high? A. About eight inches, I should judge.

Q. Isn't it a foot? Side pieces that way (indicating), so the coal could run down; sort of a box? A. Yes, sir.

Q. There is a side-piece on each one; that is, a side-piece on each side? A. Yes, sir.

Q. Now, assuming that this is the apron; the cross-piece, I understand you, would be somewhere down here, about four inches. A. Further than that; I could not say exactly. It is probably six or eight inches from the bottom.

Q. You had your left foot on that? A. Yes, sir.

Q. And there is a chain comes up here; comes up toward the top of the chutes? A. Yes, sir.

Q. Did you have hold of that chain? A. Hold of it with right hand.

Q. Where was your other foot? Your left foot, you say, was on this projection. A. The left foot was on the projection. My right foot was hanging loose.

Q. Right opposite the left foot? A. On the opposite side.

Q. On the outside? A. From the position I stood; I was facing the east.

Q. You were facing the coal chute? A. Yes, sir.

Q. If you were standing with your left foot on the projection there, and you were reaching up to the middle of the apron at the top, for the purpose of cleaning out coal with your left hand— A. Yes, sir.

Q. In order to reach that distance, Mr. Sutherland, from the corner here to the center of the apron, wouldn't you have to lie right flat on your face? A. No, sir; I did not have to lie flat.

Q Will you explain how you could have the left foot there, and with the box or board on the side of this, say eight inches high, you could have the left foot there where you had your right foot, in order to be struck by the top of this cab? You say it was hanging loose; was it hanging right opposite your left foot? A. Right beside the apron.

Q. How far out? A. It would be just probably three or four inches apart.

Q. How far was your right foot above your left foot? A. The right foot was a little bit below the left foot; a very little.

Q. How near was the right foot to the lower end of the apron. A. It hung loose.

Q. You stood this way. You had the right foot like this and the left foot this way? (Indicating.) A. Yes, sir.

Q. How could you lean over that way and reach six feet away? A. With the chain.

Q. You must remember that you were at this corner and you have to reach to the middle of the apron? A. Yes, sir.

Q. Do you think you could stand up straight there and then reach even five feet over there? A. I can in an angle on this projection.

Q. But you have to get up there eight inches; you have to get over that. A. I was on the outside of that; both limbs was on the outside of that board.

Q. And you were reaching away over there to the center of that apron? A. Yes, I was closing that trap-door.

Q. Wouldn't your right foot be necessarily lengthwise with this apron? A. No, sir.

Q. If you were leaning over there for the purpose of reaching to the center of the apron your foot would be in this way? A. It hung straight down.

Q. If you had to reach, if you were on an inclined plane which was five or six feet or more long, I will ask you how it is possible, and you only five feet eight inches high, how it would be possible for you to stand straight and reach that? A. I was in the position reaching as far as I could, and holding with my right hand.

Q. How could you do that any other way but to have your right foot on this board? A. I did not have my right foot up on the board.

Q. Could you not have put your right foot up there? A. I might have.

Q. I will ask you if you could not have put your right foot on that projection, with the le t one? A. Not very handy, in the position the apron stood, at an angle.

Q. Could you not have put your right foot on this board which forms the box of the apron? A. No, sir; you could not keep your foot there with the angle it stood. You had to put it on the cross-piece to keep up there.

Q. Why couldn't you put your right foot up there? A. I did not do it.

Q. You could have done it? A. No, sir.

Q. If you had done that you would not have been caught? A. If I had been in the inside, I would have been safer.

Q. Couldn't you have put your right foot on this projection? A. No, sir; the coal is liable to come out there every minute.

Q. But you were in there anyhow? A. I was not inside the apron. I was on the outside of the apron. If you stepped in front of the apron you was liable to get knocked off with coal.

Q. You were not reaching then? A. I was reaching across to the center.

Q. From this corner away down here? A. Yes, sir.

Q. Will you tell me how you can do that unless you laid down flat? A. I done it. I got up there and done it.

Q. When you say a horse is sixteen feet high, you stick to it? A. Yes, sir.

Q. Don't you see the utter absurdity of the position in which you get yourself? Don't you see now that this is utterly absurd? A. You may think so.

Q. I will ask you if you don't see that the statement you make is utterly absurd? A. No, sir; any man can reach it.

Q. Can reach over to the center of that apron from the lower corner of it, no difference what the distance is? Suppose it was seven feet? A. That is all right.

Q. Don't you see it is utterly absurd to talk about that? A. I got up in that position and closed the pocket.

Q. Now, I want you to identify another paper. Is that your signature?

(To which the plaintiff by his attorneys objected. Objection overruled.)

Q. Is that your signature? A. Yes, sir.

Q. Where do you live now? A. Napoleon.

Q. What is your business? A. I am in the confectionery, small.

Q. What? A. I am in the confectionery, small.

Q. What do you call your business that you are engaged in? A. Running a candy store.

Q. How long have you been doing that? A. Very near four years; past three years.

Q. Are you not keeping a saloon there? A. No, sir.

Q. And hasn't that been your business all the time since you quit? A. No, sir.

Q. You live in Napoleon? A. Yes, sir.

Q. How long have you lived there? A. A little over five years.

Q. You still live there? A. Yes, sir.

Q. Did you know Mr. George, the fireman? A. I did not know him, only by sight.

Q. He was a fireman on this engine at the time that you were hurt? A. I do not know. I do not recollect.

Q. Did you know him at that time? A. No, sir; I did not know him at that time.

Q. Don't you know that he was right there on the engine at the time you were hurt? A. He was when they were taking my boot off. I saw him there.

Q. Don't you know that he came in on the engine and was still there? A. I did not know him personally; did not know his face until after—

Q. I will ask you if that man that was on the engine at the time they were pulling your boot off did not come in on the engine? A. He was not there all the time.

Q. You mean that he was out of your sight? A. Yes, sir.

Q. You do not say that he was not there? A. I did not see him.

Q. You simply say you did not see him. You would not say he was not there? A. I think he went in on the engine and laid down.

Q. Wasn't he changing his clothes? Hadn't he come in on the engine and wasn't he taking his overalls off? A. I didn't see him.

Q. He was there after you were hurt? A. Yes, sir.

Q. Then he had not left his work, or gone away at that time? A. I did not keep track of the men.

Q. He was the fireman that came in on that engine? A. Supposed to be the fireman.

Q. And he came in on that engine? A. Yes, sir.

Q. And he was there at the time the boot was taken off? A. I didn't see him at the time.

Q. Then he was in the cab of the engine at the time the

accident took place? A. He was on the engine somewhere, but I didn't see him.

Q. He might have been on the engine and you not see him? A. He could have been.

Q. What do you mean when you say he went into the cab and laid down? A. I could not see him.

Q. What did you mean in your testimony in saying there was nobody on the engine but you and Lewis? Do you remember of saying that there was nobody on the engine but you and Lewis? A. No, sir; I do not recollect.

Q. Didn't you say that? A. I don't believe I did.

Q. If you did say it, you were mistaken? A. I know this gentleman came on after they were taking my boot off.

Q And you knew that he was the fireman that came in on the engine? A. I cannot say positive, because I did not pay any attention to it.

Q. Then when you said that he was not there, if you did say it, you were mistaken about that, weren't you? A. Yes, sir; I must have been.

Q. You worked for the company before, didn't you? A. I worked in 1881.

Q. A year before. How long did you work? A. Well, it was a short time; a little over two months probably.

Q. And then you quit? A. Yes, sir.

Q. What was you doing then? A. I was tending mostly to the ash-pit.

Q. What did you do in 1882 when you commenced work? A. Worked at the coal chutes.

Q. Wasn't you working at the ash-pit? A. Only knocking out the fire of the engine.

Q. You did the same kind of work you did before? A. No, sir.

Q. Didn't you work in the ash-pit? A. The first time I worked there I cleaned out the ash-pit. The next time we knocked the ashes out into the pit and left them there. The day men did that.

Q. Did you do any other kind of work except at the coal chutes this time? A. Yes, sir.

Q. What did you do? A. Done several things; wherever I was needed.

Q. When you say "needed," who told you to do it? A. The foreman.

Q. What is his name? A. Mr. Kemmer was foreman then.

Mr. Walker—Q. When was this that you are speaking of?

A. This was in 1881.

(We object to that.)

Mr. Collins—Q. What was the name of the foreman in 1882? A. I believe that Mr. Bramley was foreman in 1882.

Q. What other kind of work did you do besides working at the coal chutes in 1882? A. I give supplies to the locomotives as they came in off the road.

Q. What was that? A. Coal and sand and water, and knocked out the fire.

Q. What else did you do? A. The engine was run on the turn table; we had to turn it, and then we came back.

Q. When you were not engaged at that, what did you do? A. In the sand house sifting sand. Had a little place away from the round-house that we staid in.

Q. Who told you to do that? A. Mr. Gunther placed me there to do this.

Q. Gunther told you to do that? A. Yes, sir.

Q. He was the Master Mechanic, was he? A. Yes, sir.

Q. What was it that the foreman told you to do, Mr. Bramley? A. Mr. Bramley didn't tell me to do anything.

Q. He was there in 1882? A. Yes, sir.

Q. Now, did you open switches? A. No, sir.

Q. When the engine would be running through the yard, wouldn't you open switches? A. No, sir. The engine was run in on the side-track by the engineer.

Q. But when you would go to the round house, wouldn't you open switches? A. No, sir.

Q. Who would open them?

(To which question the plaintiff objected. Objection overruled.)

Q. When you would go from one track to another, who would open the switches? A. There wasn't any; yes, I believe there was. But the engine was most generally run on the side track by the engineer.

Q. Who would open the switches? A. The switches was away above us.

Q. Did you ever open the switches? A. No, sir; I did not open the switches.

Q. What was to be done that evening was, you were to get this apron up out of the way, and then you would give a signal to Mr. Lewis to move on, wouldn't you? A. Yes, sir.

Q. And it would be his duty to move when you gave him the signal? A. Yes, sir.

Q. Suppose now, that he would refuse to obey that signal; what would happen to him. What would you do? A. I don't know what would happen.

Q. Would you have reported him to the round-house? A. No, sir; I had no authority.

Q. Suppose you would give him a signal to move the engine and he would not do it? A. Let it remain there; I could not do anything.

Q. If that had got to the foreman's ears, would it have subjected Mr. Lewis to discipline? A. I could not say anything about that.

(To which question the plaintiff objected.)

Court—He may give all that he knows of this employment.

Mr. Collins—I have already proven one place where Lewis was to obey him.

(To which remark the plaintiff objected.)

Mr. Collins—I will withdraw it, if the court thinks it wrong.

Court—No, sir; go on.

Mr. Collins—Q. Now, Mr. Sutherland, that was the proper move that evening; you were to get the apron cleaned out, put up, and then give the signal to Mr. Lewis? A. Yes, sir.

Q. To move to No. 8, was what you were going to do? A. I do not know the number; Mr. Moore went to find the number. I did not know what the number was.

(Photographs marked No. 2 and No. 3, for identification. Paper containing witness' signature, marked No. 4, for identification.)

Re-Direct Examination, by Mr. Walker.

Q. You are living in Napoleon now? A. Yes, sir.

Q. Tell the jury what your business is. A. I am keeping a candy store; we call it candy kitchen. We serve a little lunch, and make some candy myself, and buy some and sell it.

Q. How long have you been in that? A. Very near four years.

Q. At the time you went into this employment, what was your business? A. I was a mason; plasterer.

Q. Have you been able, since, to follow your business? A. No, sir; could not.

Q. Previous to that, what wages were you able to make at your regular business? A. When I worked as a jour., along in '74, I drawed three dollars a day, and I have drawed three and a half a day.

Q. Up to the time this injury occurred, say when you went into this employment, what could you earn? A. The price on my labor had advanced, and I was getting from two to two and a half.

Q. It was lowered? A. It was lowered.

Q. You would get two, and two and a half a day? A. Yes, sir.

Q. Have you had any other injury except what you have described to prevent your working? A. No, sir.

Q. What is your age? A. I am forty-one past now.

Q. You are now forty-one past? A. Yes, sir.

Q. At the time of this injury you were then thirty? A. Yes, past thirty.

Q. You may tell the jury what is your best recollection as to the time when you saw Peter George that night. A. Well, I saw the gentleman on the engine as we stepped on it, and he disappeared somewheres; I could not say positive where. And after I got injured, and they were taking my boot off, this man appeared there. While I was holding my limb, and Mr. Lewis, the hostler, was taking my boot off, this man come there and stood close by me. Of course I did not know that he was the man that fired the engine at that time, really.

Q. Did you know where he came from when you saw him there, after you were injured? A. I could not say positive where he did come from.

Q. Did you know who the engineer that had left the engine was? A. No, sir; I did not see him at all.

Q. Did you know Peter George at that time? A. No, sir; I never knowed him.

Q. You say he was aboard the engine when you and Lewis went to it? A. Yes, sir.

Q. In what shape was he? A. He was with his working clothes on.

Q. Was he awake or asleep? A. He was awake, at the time we first stepped on the engine.

Q. Did you know whether he remained on or about the engine or not, until you went to the coal chute? A. No, I did not see him after we started to do our work. I did not see him until I had got hurt, and while they were taking my boot off he appeared there. I could not say just exactly where he was at the present time.

Q. I omitted to ask you in detail what may be a matter in chief.

Court—The defendant may cross-examine on it.

Mr. Walker—Q. What was the next thing to be done

with that engine that night, after the coal was put in? A. Why, it would be moved to the sand house.

Q. State if that was the next thing. What would you do first? A. Take coal.

Q. What next? A. Then we would take sand.

Q. And the next? A. Water.

Q. Would you have to move the engine each time? A. Yes, sir; Mr. Lewis would move the engine.

Q. And then where would he go with the engine? A. He would go to the ash-pit next.

Q. State if it was the duty of the helpers to go along to each one of these places. A. Yes, sir.

Q. When you got to the ash-pit, what would be done there? A. Knock the fire out and clean the ash-pan out, and leave the ashes in this pit.

Q. Where was the hostler during each of these operations? A. In the cab.

Q. Should he be in the cab? A. Yes, sir.

Q. Now whose duty was it to direct where you should go, from one to another? A. Mr. Lewis.

(To which question the defendant objected.)

Q. Who did direct in handling all these engines—who did direct this? A. Mr. Lewis handled all the engines that come in.

Q. Who directed where they should go, whether to the coal or water, or sand, or what? A. Mr. Lewis done that himself.

Q. Mr. Lewis did that himself? A. Yes, sir.

Q. Now, who was it that directed as to when and where the engine should be moved each time? A. Mr. Lewis moved it. When we wanted to get these supplies, Mr. Lewis would move it to wherever he seen fit. I had no power of telling him where to go or anything.

Q. You say you would inform him when the apron was thrown up and the engine would move? A. Yes, sir; we would give him a signal then, after we had performed that work at that place.

Q. Did engines ever come in when they did not need sand? A. I could not say positive. We most generally give every engine sand.

Q. Did you give each one of them coal, always? A. They all took coal.

Q. And all took water? A. All took water. But the sand is something that is not used so much. It is only to sand the track. Sand is not called for so much. It is put in a little place there, and they sand the track. We most generally looked and seen, and whatever was required it would be given.

Q. Who was to say whether they needed it or not? A. Mr. Lewis stayed in the cab and always demanded—

Q. And the work had to be done by the helpers. A. We had to give the supplies, whatever was required. Sometimes an engine would take more coal than it would at other times; sometimes take more sand. It is owing to how they come in.

Q. Did the men have to go under the engine in the ash-pit to rake out the ashes? A. Yes, sir.

Q. The engineer did not do that; the hostler? A. No, sir; I went under the engine most of the time.

Q. Now, you were asked if you received orders from anybody else but Lewis? A. No, sir.

Q. Did you, during the time you were working there, receive any orders from anybody else but Lewis? A. No, sir; no orders from anybody.

Q. Did you receive any orders from any person except the hostler? A. No, sir; only the hostler.

Q. And these were the only ones you have told? A. Yes, sir.

Q. Did Bramley ever give you any orders while you were there? A. No, sir; he never give me any orders.

Q. Were you ever requested by any one there to open switches or to do any such work? A. No, sir.

Q. Mr. Sutherland, you have seen some photographs here? A. Yes, sir.

Q. Did you see those photographs when they were taken? A. No, sir; I did not.

Q. You didn't see the position in which the instrument was placed? A. No, sir.

Q. Do you know the elevation-- A. No, sir; don't know anything about it.

Q. At which they were taken? A. No.

Q. Did you ever see them at all until they were shown you on the witness stand? A. No, sir; never seen them until the present.

Q. Are you able to say, from looking at them, that they are correct representations of those coal chutes? A. The chutes are; but the men, where they place the men, is not correct. The chutes are all right, but where they had placed the men to take the pictures is not correct.

Q. Where they have placed the instrument? A. Where they placed the men to take these pictures; they make the men look lower. That is not right.

Q. Then you have no knowledge, except what you have stated, of them? No, sir.

Re-Cross-Examination, by Mr. Collins.

Q. Then I understand you that the photographs are all right, except they have got the men in the wrong place? A. Yes, they have got the men in the wrong place.

Q. Otherwise they are correct? A. Yes, they look like the coal chutes.

Q. I understand you that they are correct, except that they have the men in the wrong place. This is your answer, is it? A. Yes, sir.

Q. Now, if no one ever gave you orders there except Mr. Lewis, I will ask you what you meant a while ago when you said Mr. Gunther gave you instructions about the sand? A. Mr. Gunther placed me under Lewis.

Q. But you said Mr. Gunther gave you instructions about the sand. Do you remember that?

(To which question the plaintiff objected. Objection overruled.)

Q. I will ask you, if you didn't say when I asked you who put you to work at the sand-house, if you didn't say Mr. Gunther? A. I said Mr. Gunther put me to work at the chutes under Mr. Lewis.

Q. Didn't I ask you a while ago who put you to work at the sand-house and didn't you say it was Mr. Gunther? A. Oh at the sand-house.

Q. Then somebody else did give you orders besides Mr. Lewis? A. I was placed there to do certain work.

Q. I will ask you if it is not true that somebody else did give you orders or instructions about your work except Mr. Lewis? Didn't you say that? A. I do not recollect it.

Q. Didn't you say that Mr. Gunther put you to work at the sand-house? A. I said that Mr. Gunther put me to work at this work I had to do, and placed me there—

Q. Didn't you say that Mr. Gunther put you to work at the sand-house; told you what to do? A. That was a part of the work we had to do.

Q. What? A. That was a part of the work I was employed to do.

Q. But it was Mr. Gunther that gave you instructions to do it? A. I did not see Mr. Gunther—

Q. What I asked you was, if you had not worked in the sand-house, and if Mr. Gunther did not tell you what to do? I asked you if you did not say that? A. Yes, we will call it that.

Q. Why don't you say so? Why are you hesitating about this thing? Are you trying to hold it back? A. No, sir.

Q. Why did you hesitate? You remember that you said that? A. I remember that Mr. Gunther placed me to work at this place.

Q. Didn't you remember saying that a while ago? Why are you hesitating about it? Did you try to get around it; why did you do that, can you explain? Another thing:

didn't you say, in answer to this gentleman here, that you never got any orders from anybody except Mr. Lewis? Didn't you say that? A. I was placed there under Mr. Lewis.

Q. Didn't you say you never got any orders from anybody but him? A. The hostler was—

Q. Haven't you said before this that you got orders from Brubaker? That you got orders from Brubaker? Didn't you say that you never got any orders except from Lewis? A. I was under the hostlers. Mr. Gunther placed me under those two men.

Q. Mr. Gunther was the man you were looking to for orders? A. I was looking to those men.

Q. Mr. Gunther instructed you what to do? A. He hired me, yes, and placed me there.

Q. He hired you, and told you what to do? A. I said Mr. Gunther placed me under the hostler.

Q. Didn't Mr. Gunther hire you and tell you what to do? A. Yes, sir; he placed me there at the coal chutes.

Re-Direct Examination, by Mr. Walker.

Q. What did he tell you you had to do? A. He said I was to work at the coal chutes and give supplies to the locomotives, under the hostler.

Q. Go on and tell it all. A. That is all there is of it.

Q. Was the sand-house work a part of it? A. Yes, sir.

Q. Did Mr. Gunther mention to you anything about the sand-house? A. Not direct, he did not; only that certain amount of work all went with these parties that belonged to the coal chutes.

JOHN BRUBAKER,

being duly sworn, testified as follows:

Direct Examination, by Mr. Walker.

Q. You may state in whose employment you were in January, 1882? A. In whose employ? I worked for the B. & O. Railroad Company.

Q. Do you know Mr. William Sutherland? A. Yes, sir.

Q. Do you remember his being hurt at Chicago Junction? A. Yes, sir.

Q. At that time in whose employ were you? A. I was employed by F. J. Gunther.

Q. In whose employment; what company? A. B. & O. Railroad Company.

Q. Where at? A. At Chicago Junction.

Q. In what employment were you? What kind of work did you do? State if you were acting as a hostler. A. I was extra hostler.

Q. You were extra hostler; what do you mean by that? A. Worked extra. I was not a regular man.

Q. Who was the regular man? How was it about Edward Lewis being the man? A. I think Edward Lewis was working regular.

Q. How? A. I think Edward Lewis was the regular man at that place, at that time.

Q. How long did you work there, at that time, in that capacity? A. How long did I?

Q. Yes, in that capacity? How long had you been working there when Sutherland was injured, in January? A. I think about two years.

Q. In the same capacity? A. No, sir; not in the same capacity.

Q. State if you worked occasionally during that time as an extra hostler. A. I worked occasionally as hostler.

Q. Do you remember when Sutherland came there first, to work at that time, that winter? A. Yes, sir; I worked with Mr. Sutherland, I think the first night that he was there.

Q. Do you remember the date? A. No, sir; I do not.

Q. About how many nights did he work under you before Ed. Lewis came back?

(To which question the defendant objected.)

Q. I will ask you if he did work under you?

(To which question the defendant objected.)

Q. In what capacity were you acting when Sutherland came there, in January, 1882? A. I think I was tending coal chutes at the time he first commenced to work there. That is, I was giving supplies to engines.

Q. In what capacity were you acting, as hostler? A. No, sir; I was not acting as hostler at that time. I do not know when Mr. Sutherland first commenced to work there.

Q. State if you did at any time while he worked there. A. Yes, sir.

Q. If you did not act as hostler, who did? A. Mr. Lewis and Mr. Bramley sometimes acted as hostler.

Q. Do you remember of Mr. Bramley acting as hostler during that time? A. I do not think Mr. Bramley acted as hostler during the time that Mr. Sutherland worked there; I do not think he did.

Q. If you did not, who did, if you remember? A. Mr. Edward Lewis.

Q. Do you remember now, whether you acted as hostler during the time that Sutherland was there, and before he was hurt? A. Have I acted as hostler?

Q. Did you act as hostler, extra hostler? A. Yes, I acted as hostler.

Q. But I understand that Lewis had come back before Sutherland was hurt, is that so? A. What do you mean by Mr. Lewis coming back?

Q. What could I mean? Had he been off duty for a few days? A. Mr. Lewis?

Q. Yes. Was he during that month? A. Not that I remember.

Q. Why was it that you acted at that time during January, 1882? A. Why?

Q. Yes. A. When Mr. Sutherland was hurt, then I took Mr. Lewis' place. I believe thirty days it was I acted as hostler.

Q. We are talking about when Mr. Sutherland first

came there to work, before he was hurt. Did you act as hostler at any time? A. Yes, sir.

Q. While Mr. Sutherland was there? A. Yes, sir.

Q. How many nights? A. I do not remember in regard to that.

Q. Can you not tell anything about how many? A. No, sir; I could not; I do not remember.

Q. Will you tell the jury what the duty of the hostler was there? A. Hostler's duty?

Q. Yes; just tell the jury? A. The hostler's duty is to take charge of the engine and see that the engine has proper supplies before he puts the engine in the round-house.

Q. Where did the hostler usually find the engine? A. On the engine-track, side-track.

Q. Was that near the coal chutes? A. Built expressly for delivering engines on.

Q. It was between the main track and the coal chutes? A. Yes, sir.

Q. When the hostler would come to the engine where it stood on the side-track, what was his duty?

Mr. Collins—He has already stated it was to give it coal, water, etc.

Mr. Walker—Q. Who would move the engine?

A. The hostler.

Q. Did he have anybody with him to help him? A. Yes; he generally had one or two helpers; sometimes three.

Q. Who was the one to give directions about what should be done? A. When the hostler takes charge of the engine the man that tends the coal chutes, has the number of the pockets. He tells the hostler what number to set the engine at to take coal. The hostler must go by his orders to get coal. After that these other men are working under the hostler.

Q. The first thing is to inform the hostler which pocket to go to? A. Yes, sir.

Q. What governs that? A. Sir?

Q. What governs that? The place where they are to stop.

A. These pockets at the coal chutes—there is a number painted on each apron. Commencing at the end, the first number is No. 1, and the second is No. 2. That is the way you can tell where to go.

Q. Do these helpers have to go and find what amount of coal there is in each pocket? A. He does, if he has not got it down on a piece of paper.

Q. Whose duty is it to find that out? A. It is in the man's place that tends to the coal chutes.

Q. The helpers? A. Any one of the helpers.

Q. One of the helpers goes and looks and sees the amount of coal? A. Looks and sees what amount of coal is in each pocket.

Q. And sets it down on a piece of paper, and he tells the engineer or hostler which pocket has about the right amount of coal in? A. Yes, sir.

Q. And the engineer goes to it? A. Sets the engine to that apron.

(To which manner of examination the defendant objected.)

Court—Let him go on and state how it is done.

Q After taking coal, where do they then go with engine? A. Go to the sand-house and stop there in case they want sand. And if they do not want sand, they run up to the ash-pit and knock the fire out.

Q. And after that what does the hostler do with the engine? A. He runs the engine on the turn-table and from there in the round-house.

Q. There his duty in regard to it ends, does it? A. Yes, his work is done with the engine.

Q. At the time that this occurred, in 1882, who, if anybody, was in general charge of the works, shops and men at Chicago Junction? A. F. J. Gunther.

Q. State who employed the men? A. Mr. F. J. Gunther employed the men.

Q. If a man was to be discharged, who discharged him;

who would have the duty? A. Nobody but Mr. F. J. Gunther.

Q. Now, Mr. Brubaker, how were these coal chutes handled by the helpers; just describe the handling of the apron and any machinery that there was to be handled there. A. Well, in the first place the apron must be pulled down, and then there is a lever in under the apron on the coal chute with an iron rod running up through the apron and fastening the door. You have to pull that lever down in order to let the coal out of the pocket. Then sometimes a little coal would catch on the iron rod. You would have to get up there and take the coal out, shut the door up so that when you put the rod up it would fasten the pocket, and then throw up your apron. That was all the work that the helper had to do.

Q. In what position would the helper be in cleaning out the groove to let the little trap-door go snug back to its place so as to let this rod go up? A. A man can get into a good many different positions to do that work, of course. He can put his foot on the brace, and lean up on the apron and pull the coal out. I have done the same many a time myself.

Q. What brace do you refer to? If this represents it at all, (model) indicate the brace. I do not ask you if it represents it? A. I refer to this brace that runs across the bottom of the apron.

Q. You say you put your foot on the brace and lean up on the apron? A. Put your foot on the brace, take hold of the chain with one hand, and reach up and scratch the coal from under the trap door with your hand, and shut your pocket. Or you can step inside of the apron. You can take hold of the chain, and walk inside of the apron and raise the door, and throw the coal away with your hand and shut the door.

Q. Suppose that he sets his foot on here, takes hold of this chain and rests himself on this apron and reaches up there; now what does he have to do in the way of handling

this bar afterwards? A. He has to raise the bar up and put the pin in the chute that fastens the lever.

Q. To hold it to its place? A. That holds it to its place.

Q. Then the little trap-door, is that shut? A. Yes, sir.

Q. Then after that, what does he have to do to get the apron up? A. Takes hold of the apron with his hand and raises it up.

Q. Throws the apron up? A. Yes, sir.

Q. Well, if he had his left foot on this pin, or on this brace, where would his right leg be when he was reaching to reach this place where the trap-door is being cleaned out? Suppose he had his left foot on the brace? A. Sometimes if a man wants to make a quick move, his right limb would lay loose, or he might put one foot against the coal chute here and the other on the brace, if he had considerable to take out of the pocket.

Q. Could he on this as they were constructed, have his left foot on here and touch his right foot against the coal chute here? A. Yes, sir.

Q. And then he could reach the pocket, could he? A. Yes, sir.

Q. In whose employment are you now, Mr. Brubaker? A. B. & O. Railroad Company.

Cross-Examination, by Mr Collins.

Q. Suppose he was standing this way and had his left foot there, and wanted to reach over there five or six feet; how could he do that with his right foot on top there? A. He could not get his right foot on top of the apron if he had his left foot there.

Q. Wouldn't that be about as awkward a fix as a man could get into, to have his left foot there and his other one dangling out there; could he stand up straight and reach that? A. No, sir; he would have to lean over.

Q. Then his right foot would run slanting down the same way as this? A. Yes, sir.

Q. It would run lengthwise, this way? A. A little bit.

Q. And his foot would be in just about the same direction that this is? A. The one that is on the brace?

Q. The other one that is loose? A. The other would hang straight down.

Q. But if he had his left foot here and was reaching over there, would his right leg be in such a position as that? A. No, sir; his right leg would be hanging straight down.

Q. Then he would be standing straight? A. No, sir.

Q. Suppose that he took hold of the chain with his right hand, and this is the foot on here; how could he get away over there? A. That is easy enough.

Q. You say there are several other ways that that could be done. A. Certainly.

Q. Which is the safest way? You say he could get right inside of that. A. Every way is safe enough, as long as the engine stands still.

Q. But suppose there is danger of it moving, then where would the safest place be? A. The safest place would be on the back end of the tender.

Q. I will ask you if the safest place, in case there was danger of the engine moving, would not be right inside of the apron? A. There would not be quite as much danger of getting mashed; but a man would be in a dangerous place.

Q. That is a dangerous business; the whole thing is dangerous? A. Yes, sir; it is a hazardous business. A man wants to attend to his business.

Q. I understand you to say that it is the duty of the helper to select the pocket that you are to go to; one of the helpers takes a paper and selects the pocket that you are to go to. A. Takes a paper and goes up on top of the coal chute, takes the number of the pocket, and the number of bushels of coal there is in each pocket.

Q. And I understand you he gives the direction to the hostler where to move to? A. Yes, sir; he does.

Q. It is the duty of the hostler to move where he directs? A. Yes, at the coal chutes.

Q. Then, at the coal chutes, the hostler is under the helper?

(To which question the plaintiff objected.)

Q. I will ask you if it is not a fact that it is the duty of the hostler to obey the helper? A. While taking coal, he tells him what pocket to set the engine at.

Q. It is the duty of the helper to give that direction? A. Yes, sir.

Q. And he does give it? A. Yes, sir.

Q. And it is the duty of the hostler to obey it. A. Yes, sir.

Q. Suppose the hostler would not do it; what would the helper do? A. Throw a chunk of coal at him.

Q. I object to laughing. We are engaged in an important question, and I do not want any more witticism. A. That is just what I would do.

Q. Then you would both be discharged by the Master Mechanic or foreman. A. Be very likely to be discharged.

Q. Then your duty would have been to have reported him to the Master Mechanic? A. It would be proper.

Q. That would be the proper thing to do? A. Yes, that would be proper.

Q. Then it would be the duty of the helper, if he would give the hostler an order to move, and the hostler would refuse, the proper course would be for the helper to report him? A. Certainly.

Q. And then the foreman or Master Mechanic would discipline him. A. Yes, sir.

Q. Would suspend him, or do something else with him. Then I understand you that in giving coal it is the duty of the helper to select the pocket you are to go to, and give orders to the hostler, and it is the duty of the hostler to obey the

orders. A. Yes, sir; that is the way I have always worked there.

Q. That is the way you have always understood it. Now, after this performance of cleaning out the coal out of the apron, moving it up—after the helper gets that done, it is his business to signal the engineer to move on, isn't it? That is, if you are going to another pocket, it would be his duty to signal the engineer to move on? A. It is his business to tell him what pocket to go to.

Q. It would be his business to tell him what pocket to go to, and it would be the duty of the hostler to go there? A. Yes, sir.

Q. The engineer is not supposed to see this business of cleaning out the pocket? A. No, sir.

Q. Then he waits for the signal of the helper, and it is the duty of the helper to give the signal to move on? A. The hostler moves according to his instructions at the coal chutes.

Q. What? A. The hostler moves according to the instructions of the helper.

Q. And after the helper gets that apron cleaned out, then he gives the signal to move, and it would be the duty of the hostler to move, wouldn't it? That is so? A. Sometimes they give signals, and sometimes they tell them.

Q. It would be to give an order in some form to move? A. He must tell him, first, where to go.

Q. Tell him where to go, and then when the end is reached, tell him where to move? A. Just as they move up to the pocket he gives them a signal to go further back or to go ahead.

Mr. Walker.—Q. How is that? A. As the hostler is moving the engine along to come to the pocket, the helper gives him a signal as to—if he wants him to move on a little further ahead, give him a signal to go ahead a little further, and when he is ready to stop, gives him a signal to stop, after night. In day-time we can see.

Mr. Collins.—Q. It is the duty of the hostler to obey these signals? A. Yes, sir.

Q. Did I understand you to say that Mr. Gunther did the employing and discharging? A. Mr. Gunther employed me.

Q. He did the employing and discharging? A. Yes, sir.

Q. Do you know of the fact that in employing and discharging he simply acted under the directions of Mr. Harrison, Superintendent of Motive Power?

(To which question the plaintiff objected.)

Mr. Collins.—What I propose to show is that Mr. Gunther is simply acting under the direction of his superintendent.

Q. I will ask you if that is not so, Mr. Brubaker?

Court—If he knows.

A. Yes, sir, that is so. He acts under the instruction of Mr. Harrison. They are allowed so many men; he has a right to employ so many.

Q. Who fixes the amount? A. Mr. Harrison.

Q. The Superintendent of Motive Power? A. Yes, sir.

Q. And then when Mr. Gunther employed and discharged men he was acting under the direction of the Superintendent of Motive Power? A. Yes, sir.

Q. Now, all the men there in the shops were working under Mr. Gunther and the foreman, were they not? A. At that time; yes, sir.

Q. All working— A. All working under Mr. Gunther.

Q. There was a night foreman and a day foreman? A. He was working under Mr. Gunther.

Q. He had charge of everything in Mr. Gunther's absence? A. Yes, sir.

Q. When Mr. Gunther was away the night foreman was the man in charge, and everybody there was working under him; wasn't that so? A. They were working under John Kimmer, day foreman.

Q. Suppose that Mr. Gunther was away and they had a night foreman, wouldn't the night foreman have charge of

everybody during the night? A. Yes, sir; during the night.

Q. During the day-time they would be under the day foreman? A. Yes, sir.

Q. Then every man in these shops, about the coal chutes, and everywhere was at night under the direction and orders of the night foreman? A. He was their boss, of course.

Q. Everybody there, helpers and laborers, and hostlers and everybody else was under the direction of the night foreman at night? A. He was at the head; yes, sir.

Q. He was at the head of the whole business? A. Yes, sir.

Re-Direct Examination, by Mr. Walker.

Q. Was you ever present at any interview between Mr. Harrison and Mr. Gunther when this subject was talked over? A. No, sir.

Q. You never heard any instructions given by Mr. Harrison to Mr. Gunther about these matters? A. No, sir.

Q. You may tell the jury when the hostler took possession of the engine—any engine—that come in, who was it that decided what the engine should take, whether coal, sand or water; was it the hostler? A. The helper. The hostler was to go—would go according to the helper's direction to take coal.

Q. Just a moment; in regard to anything else— A. The hostler was at the head; they worked under the hostler.

Q. How in regards to everything else? A. So far as taking coal is concerned, the hostler obeyed the helper's instructions.

Q. As to doing what? A. Taking coal. As to giving the engine a proper supply of coal.

Q. Is the duty of the helper stated in what you said before; that he was to give him the number of the pocket to which he should go?

(To which question the defendant objected.)

A. Told him what number.

Q. What number of pocket? A. Yes; to go to for coal.

Q. After that he was under the helper? Aside from directing what pocket to stop at, the number of it, had the helper any further control over the matter? A. No, sir.

JAMES MOORE,

being duly sworn, testified as follows:

Direct Examination, by Mr. Walker.

Q. Where do you reside? A. Chicago Junction.

Q. Where did you reside in 1882? A. Chicago Junction.

Q. In whose employ or in what employment were you? A. Employed by the Baltimore & Ohio Railroad Company.

Q. Are you still in the employ of the Company? A. I am employed by the Baltimore & Ohio Railroad Company.

Q. You are still? A. Yes, sir.

Q. You may tell the jury in what capacity you were acting in January, 1882? A. I was helping the hostler.

Q. Do you remember the circumstance of Mr. Sutherland coming there to work in that capacity? A. I do not know just the time he came there, I know he was working there, however.

Q. Do you remember the circumstance of his getting hurt? A. Yes, sir.

Q. Was you on duty that night? A. Yes, sir.

Q. Were your duties day duties or night? A. Night.

Q. Who was the hostler when Mr. Sutherland came there, about that time? A. Mr. Lewis.

Q. Do you remember of Mr. Brubaker being extra hostler for a few days there, or nights? A. Yes, sir; he worked extra some.

Q. Do you remember whether he worked there after Mr.

Sutherland came, for a few nights, or don't you remember? A. I don't remember whether he did or not.

Q. Who was acting as hostler on the night Mr. Sutherland was hurt? A. Mr. Lewis.

Q. Well, do you know at that time what the duties were of the hostler? A. The duties were to move the engine and see that they had supplies, and put in the round house.

Q. Take the engine and see that it had supplies and put it in the round house? A. Yes, sir.

Q. What were the supplies? A. Coal, water and sand, cleaning the fire out.

Q. When the engines were brought in from the main track, where were they left by the train men? A. Left along the coal chutes.

Q. State if there was a side-track from the main track that led to the main track? A. No, sir.

Q. Was there a track that led to the coal chutes from the main track? A. A track led from the main track to the coal chutes.

Q. How near to the coal chutes were the engines usually left? A. Sometimes right along side of the chutes, sometimes below.

Q. That would be west of the coal chutes? A. Yes, sir.

Q. How far away? A. About three hundred feet.

Q. Who gave the directions—whose duty was it to give directions what they would take on of these supplies? A. The hostler most generally done that.

Q. What duty had the helpers? By the way, how many helpers did they have that night he was hurt? A. Two.

Q. Who were they? A. Mr. Sutherland and myself.

Q. Under whose orders did the helpers do their work? A. Under the hostler.

Cross-Examination, by Mr. Collins.

Q. Mr. Moore, do you agree with Mr. Brubaker, that while coal is being taken, that it is the duty of the hostler to obey the helpers?

(To which question the plaintiff objected. Question withdrawn.)

Q. I will ask you if it is not a fact that while you are taking coal, it is the duty of one of the helpers to give directions as to where coal shall be got, and it is the duty of the hostler to obey his directions? A. Yes, sir.

Q. And in the movement of the engine it is the duty of the hostler to obey the helper, as he gives the direction for the movement, isn't it? A. Sometimes it is, and sometimes it ain't.

Q. Suppose that Mr. Sutherland was cleaning out this apron; wouldn't it be his business, when he got that done to give directions—to give the signal for the movement of the engine? A. Yes, sir.

Q. And would it be the duty of the hostler to obey his signal? A. Yes, sir.

Q. I will ask you, Mr. Moore, if you were not on top of the chutes that night at the time that Sutherland was hurt? A. Yes, sir.

Q. And if you were not giving directions for the movement of that engine and what pocket to go to? A. Yes, sir.

Q. And I will ask you if you didn't give your directions to Sutherland, and if Sutherland did not give directions to the engineer for the movement of the engine? A. No, sir.

Q. Who did you give your directions to? A. To Mr. Lewis.

Q. You gave it to Mr. Lewis. What did you say? A. I told him he would find coal enough at No. 8.

Q. Did you tell him anything else? A. That was all.

Q. Did you hear Mr. Sutherland say, "go ahead?" A. No, sir.

Q. How far were you from him? A. Probably twenty feet.

Q. Did you hear the engine when it started? A. No, sir.

Q. Then you did not hear any of this accident at all? A. Not until I heard him holler for Mr. Lewis to go ahead, that he had caught him.

Q. Then you did hear him tell him to go ahead? A. I heard him holler and tell him to go ahead, that he was caught, to go ahead.

Q. Did you hear Mr. Sutherland say "go ahead"? A. Yes, sir.

Q. And you heard it some time while they were down there; were they in sight of you? A. It was dark; I could not see them.

Q. You heard Mr. Sutherland say "go ahead"? A. Yes, sir.

Q. How long was that after you heard him say, "You have caught me? A. He said it right at the same time. He told him to pull the engine ahead, that he had caught him.

Q. Did you hear him say anything before that? A. No, sir.

Q. But you did hear these expressions? A. Yes, sir.

Q. And you were out of sight of them, and they were out of sight of you? A. Yes, sir.

Re-direct Examination, by Mr. Walker.

Q. Mr. Moore, you heard him say, "Go ahead, you have caught me"; is that what he said? A. Yes, sir.

Q. Did you hear him say "go ahead" or "all right," only at that time, when you say he said "you have caught me"? Did you hear him say "go ahead" or "all right" except in that connection, when he said, "you have caught me"? A. No, sir.

Q. To go from No. 11 to No. 8, would he go ahead, or would he have to back? A. Would have to back.

ALBERT BURDGE,

being duly sworn, testified as follows:

Direct Examination by Mr. Walker.

Q. In January, 1882, where did you reside? A. Chicago Junction.

Q. In whose employ were you at that time? A. I was working for Fred Bunchell.

Q. I refer to what company? A. Baltimore and Ohio.

Q. You were in the employ of the Baltimore and Ohio Company? A. Yes, sir.

Q. Where at? A. Chicago Junction.

Q. In what capacity were you working? A. Working on the section.

Q. Do you remember of hearing of Mr. Sutherland being hurt? A. Yes, sir.

Q. After Sutherland being hurt, what did you do? A. Worked at the coal chutes.

Q. State, if you took the place occupied formerly by Sutherland? A. Yes, sir; I took his place.

Q. Who gave you that? Who employed you to take that place? A. Mr. Gunther.

(To which question and answer the defendant objected. Objection sustained.)

Q. Mr. Burdge, in whose employ are you now? A. I am in the employ of the Electric Light Company.

Q. You are not in the employ of the Baltimore & Ohio Company. A. No, sir.

Q. You may tell the jury how long you acted there in that capacity, as helper to the hostler.

(To which question the defendant objected, on the ground that that has nothing to do with the case. Objection overruled; to which ruling of the court the defendant, by its counsel, at the time excepted.)

A. I most forget. I could not say how long I worked there.

Q. Give an idea of how long; about how long? A. I worked there off and on for about three years.

Q. In that capacity? A. Yes, sir.

Q. Now, Mr. Burdge, you may tell the jury whose duty it was to take charge of giving engines their supplies when they came in from their runs, during the night season?

(To which question the defendant objected.)

Court—If the witness has any knowledge of the duty at the time of this accident, there is no objection to that testimony; but the duties may have been entirely changed afterwards and he know nothing about it.

Mr. Walker—Q. You may tell the jury whose duty it was at the time that you were there, if you know, whose duty it was to take charge of the engines in giving them supplies, at that time?

(To which question the defendant objected.)

A. It was the hostler's place to take charge of the engine—

Court—The witness, I do not think, qualifies himself.

Mr. Pratt—I understand you to say you took Mr. Sutherland's place? A. Yes, sir.

Q. How soon after he was injured did you take his place? I will ask you if it was the same night? A. No, sir; it was not the same night.

Q. How soon after was it? A. About three or four days after he was hurt.

Q. Do you know who acted in Sutherland's place after he was hurt, up to the time that you took it? A. Some of the day men; they took turn about.

Q. You may tell the jury whose duty it was, at the time you went there, if you know, whose duty it was to take charge of the engines in giving them supplies at that time.

(To which question the defendant objected. Objection sustained. To which ruling of the court, the plaintiff, by its counsel, at the time excepted.)

Mr. Walker—Q. Mr. Burdge, do you know anything

about the duties of hostler before Mr. Sutherland was hurt? A. Sir?

Q. Did you know anything about what the duties of the hostler were before Mr. Sutherland was hurt? A. No, sir.

Q. Had no knowledge? A. No, sir.

Q. I do not know but what the question is already made, but I will ask the question for the purpose of making it definitely. What were the duties of the hostler in that same yard when you went there three or four days afterwards and took that employment?

(To which question the defendant objected. Objection sustained; to which ruling of the court the plaintiff, by his attorneys, at the time excepted.)

Mr. Walker—Now, I offer to prove by this witness—

Court—It is not necessary, and our Circuit Court has said it is improper to make the offer before the jury. You may make it to the court hereafter. The court will consider your statement made, or you may make it hereafter, before the conclusion of the trial, out of the hearing of the jury.

(No cross-examination.)

MRS. LOTTIE SUTHERLAND,

being duly sworn, testified as follows:

Direct Examination, by Mr. Walker.

Q. Mrs. Sutherland, you are the wife of the plaintiff here, are you? A. I am.

Q. In 1882, were you the wife of Mr. Sutherland then? A. Yes, sir.

Q. When he was injured on the Baltimore & Ohio road? A. Yes, sir.

Q. Where did you reside then? A. In Chicago Junction.

Q. With reference to the railroad track, where was your house? The Baltimore & Ohio track. A. You mean the yards.

Q. With reference to that, where did your house stand?

A. Well, our yard ran down to the alley. There was just an alley between us and the railroad fence.

Q. Do you remember the night your husband was injured; the circumstances that occurred? A. Yes, sir; I shall never forget it, either.

Q. You will not forget? A. No, sir.

Q. You may tell the jury when, if at all, you got notice of your husband being hurt? A. About half-past one—

Q. Did you see him before he was brought home? A. No, sir.

Q. In what condition was he when brought home? I will ask you how he was brought there? A. I believe on a truck. I did not see the conveyance that brought him there. My husband told the gentlemen that brought him home where the key was. I generally stuck the key under the door. He came in before daylight in the morning, and he would get the key and come in and make the fire. Of course he knew where the key was, and he told them where it was, and the doctor, Dr. Young, came up into my room, where I was sleeping, and told me that he was hurt.

Q. You learned that he was hurt? A. Yes, sir.

Q. Was that the first you learned of the accident? A. Yes, sir.

Q. Then they brought him to the house before you had heard otherwise of the injury? A. Yes, sir.

Q. You can go on and tell the jury, now, what transpired after he was brought home, right along, in the way of treatment; any surgical operation that was performed; what his sufferings were. Just go on and state it? A. Do you refer to when I came down stairs?

Q. Yes, that evening. A. When I came down stairs, the first thing I did was to make a fire. He was almost froze, and he was in this condition, with his hands right under his limb; and the doctor took his lance and cut the overalls and then his pants, and then his underdrawers, and we thought that the limb was swollen so that it could not have held it, if the goods were not very strong.

Q. It was swollen so that the cloth had to be cut off? A. Yes, sir.

Q. What was done with him? A. The doctors made an examination. Doctor Young made an examination, and he said his leg was broken. That is all he told me until daylight, and then he said he would send for Doctor Kling. He said he wanted Doctor Kling to help him amputate the limb. That was along about six o'clock in the morning. He says, "I will have to have Doctor Kling to assist me. He is a good surgeon; I want him to assist me in amputating the"—

Q. I would rather you would omit the conversations. It is not proper testimony. You may state if Doctor Kling came. A. Yes, sir.

Q. About when did he come? A. I think on the eight o'clock train; it has been so long, I have almost forgotten.

Q. On the three o'clock train? A. On the eight o'clock train in the morning, as near as I can tell now.

Q. Mrs. Sutherland, state if any other doctor or surgeon came there on that next day after he was hurt, besides Doctor Kling? A. Yes, sir; Dr. Spooner, of Republic.

Q. What time did he come? A. I think on the nine o'clock train.

Q. Was there anything done in the way of an operation that day? A. No, sir.

Q. When was it done? A. The accident happened on Monday night, and on Wednesday at ten o'clock they amputated the limb.

Q. The amputation was made on Wednesday? A. Yes, sir; at about ten o'clock.

Q. You may tell the jury what the condition of your husband was at the time the amputation was effected. What effect did it have upon him? A. The first forty eight hours he could not keep even water on his stomach, and we had to just one of us stay continually by the bed-side and keep our hands on that limb, for fear that he would jerk and do some injury to the arteries or something. And for the length of about two weeks—inside of two weeks, I think, was when he

had this abscess, a sort of an abscess; I do not know what it was. It was caused from the injury, but it worked a good deal like an abscess.

Q. It resulted from the inflammation? A. Yes, sir. And the end of the stump was swollen so that I was sure the flesh would burst, and I greased it. The doctor told me to grease it.

Q. How high up on the side of the body did the swelling come? A. Clear to his shoulder.

Q. How was it about the swelling— A. The arm was swollen clear down that far (indicating.)

Q. Clear down the arm? A. Yes, sir.

Q. How great was the swelling? A. I was afraid the flesh would burst.

Q. State if it had that appearance? A. Yes, sir.

Q. What was the result afterwards in regard to sloughing and so on? A. The limb sloughed so that I had from twenty to twenty-two sheets in the wash every week. So you may consider from that what it was; and he was in that condition for five weeks.

Q. What was the fact about there being holes with pipes through from the hip to the end of the stump? A. When we would put in medicine and water to wash that, there was a tube that went right through the muscles, out at the end of the stump, down towards the end.

Q. How long did that continue in that condition? A. It never healed up until the next October.

Q. It did not? A. No, sir.

Q. How has it been about any injury since? A. Well, he has more or less trouble with it all the time. It has not been but three weeks ago since he had an abscess from wearing that artificial limb.

Q. Where was that located? A. Up in the thigh.

Q. You say that was under the artificial limb, or produced by it? A. Produced by it; yes, sir.

Q. How has it been about forming small abscesses on the end at different times? A. That occurs often.

Q. How long did those form or continue forming? A. At first they were more frequent than they are now.

Q. Has there been anything else occur to injure his health except this? A. A year ago last March, the 27th, he was walking on the street, and there had been some clay—water had washed some clay upon the—

(To which question defendant objected, for reason that it is too remote. Objection sustained.)

(No cross-examination.)

WILLIAM SUTHERLAND,

being re-called, testified as follows:

Direct Examination, by Mr. Walker.

Q. You may tell the jury what the character of the night was on the night you were hurt, that you have described, as to the condition, light or dark? A. It was a pretty dark night.

Q. What was your answer? A. It was real dark that night?

Q. Were there any lights about that station; any permanent lights? A. No, sir.

Q. What, if any, lights were there of any kind? A. Each one of us had a lantern. The two helpers both had a lantern apiece.

Q. You and the other helper each had a lantern? A. Yes, sir.

Q. Had you any other lights of any kind? A. No, sir; no other kind.

Mr. Collins—I would like to inquire what is the purpose of this testimony; if it is for the purpose of showing that the defendant was negligent in not having lights there, that is not in this case.

Mr. Walker—It is simply to show the circumstances.

Mr. Collins—On that ground I do not object to it.

(No cross-examination.)

Thereupon the plaintiff rested.

DEFENDANT'S TESTIMONY.

And the defendant, to maintain the issues upon its part, called the following witnesses, and offered the following evidence, to-wit:

Deposition of William H. Harrison read, certified copy of which deposition is hereto attached, marked No. 5, and made a part hereof.

Direct examination in said deposition read by J. H. Collins. And the plaintiff objected to the following question in said deposition, to-wit:

"Fifth question.—What other employe or officer of the Baltimore and Ohio Railroad Company, at Chicago Junction had authority or control over other employes?"

(Objection overruled.)

And the plaintiff objected to the following answer, being the answer to the tenth question in said deposition, to-wit:

"None whatever, except as co-laborer working together."

(Objection sustained, to which ruling of the court the defendant, by its attorney, at the time excepted.)

And the plaintiff objected to the following question and answer in said deposition, to-wit:

"12th question.—What were, at the time named, the relations existing between said Lewis, the hostler, and the said Sutherland, the laborer, in the Chicago Junction yards?"

"Answer.—Nothing but co-laborers. By co-laborers I mean, there was one of them a hostler, but they were both employes of the railroad company working together."

(Which objection was sustained; to which ruling of the court, the defendant, by its attorney, at the time excepted.)

And the plaintiff objected to the following question in said deposition, to-wit:

"13th question.—Suppose that Edward Lewis, as hostler, was in charge of an engine at the coal chutes for the purpose of coaling it, and Sutherland was on the engine as a laborer, assisting him, and suppose that Sutherland should disobey Lewis's instructions, what would Lewis do?"

(Which objection was overruled.)

Cross-examination read by Mr. Pratt.

WILLIAM BRAMLEY,

being duly sworn, testified as follows:

Direct Examination by Mr. Collins.

Q. Mr. Bramley, where do you reside? A. Chicago Junction.

Q. What is your business? A. I am round-house foreman for the Baltimore and Ohio Railroad Company at Chicago Junction.

Q. Previous to that, what was your business? A. Well, I have been foreman off and on, and worked at machinist trade.

Q. Were you ever an engineer? A. Yes, sir.

Q. How long? A. Oh, I run an engine several years; cannot tell just how many years.

Q. Were you ever an hostler? A. I have hostlered once in a while to help them out. I never was a regular hostler.

Q. But you have done business of that kind? A. Yes, sir.

Q. In January, 1882, what was your position? A. I was night foreman of the round-house, at Chicago Junction.

Q. What were your duties as night foreman? A. Well, I had charge of the machinery department business during the night.

Q. What did that include? A. It included the hostlers, coal shovellers, machines, everybody combined in the machinery department.

Q. Included everybody that was there? A. Yes, sir.

Q. Do you remember the night Mr. Sutherland was injured? A. Yes, sir.

Q. Who had charge that night of the hostlers, that is, Lewis, and of the laborer, Sutherland? A. I had charge of them.

Q. Under whose direction were they working? A. Under mine.

Q. Were they working under the direction of anybody else, any of them? A. Mr. Gunther was general foreman; we were all working under his instructions.

Q. I mean at night? A. Under my directions.

Q. What were the duties of Sutherland? A. Helping, we would pronounce it, taking care of the engines, giving them supplies, coal, sand.

Q. He was called, in the papers, a laborer? A. Yes, sir.

Q. Mr. Bramley, whose duty was it there to employ and discharge the men? A. Why, Mr. F. J. Gunther.

Q. Now, in employing and discharging men, under whose orders did he act? A. Why he used his own pleasure at that time.

Q. What had Mr. Harrison, Superintendent of Motive Power, to do with it?

(To which question the plaintiff objected.)

Q. Do you know what position Mr. Harrison occupied at that time? A. Superintendent of Motive Power.

Q. Did that include the shops at Chicago Junction? A. Yes, sir; all over the road from the Ohio river.

Q. What had he to do with the employing and discharging of men, there, if you know? A. If anybody was employed or discharged that he did not see fit to use there, why of course he could countermand the order.

Mr. Pratt—Q. Harrison could countermand Gunther's order? A. Yes, sir.

Mr. Collins—Q. Whose orders were the laborers, the

helpers and the hostlers bound to obey at the time Sutherland was injured?

(To which question the plaintiff objected.)

Q. Whose orders on that night were Sutherland and Lewis and Moore bound to obey? A. They were bound to obey my orders that night. There was nobody else there to give orders but me

Q. Was either of them bound to obey the orders of anybody else? A. If Mr. Harrison or Gunther came around and gave orders, they were bound to obey them.

Q. Well, anybody there at Chicago Junction? A. Not at that time, no, sir.

Q. Your title was, night foreman? A. Yes, sir.

Q. Was the accident to Mr. Sutherland reported to you? A. Yes, sir.

Q. Who reported it? A. I do not remember which one it was. There was one of them came up and told me. I don't remember who it was.

Q. Were these helpers, upon that night, either Sutherland or Moore, placed by you under the charge of Lewis? A. No, sir.

(To which question the plaintiff objected.)

Q. State whether or not— A. They were not placed there directly by me. That was the place that they were hired to fill, and they were acting along night after night. That was the place they were hired to fill.

Q. What were Lewis' duties? What were the duties he was hired to do? A. He was the man we called hostler. He was handling the engines, moved them around. Move them around from where the engineer left the engine to the coal chutes, and on until he got in the house.

Q. What was Sutherland employed to do?

(To which question the plaintiff objected)

Q. Do you know what he was employed to do? A. He was employed there as laborer.

(To which question the plaintiff objected.)

Court—If this witness knows what his duties were on that occasion, of his own knowlege, he can tell.

Q. What were the duties for which Mr. Sutherland was employed there in these shops, if you know? A. He was hired as laborer.

Q. What were the duties of laborers? A. They do anything that you request.

Q. Who does the requesting? A. The foreman, generally. If a man is hired and put along with the hostlers, he generally stays there until they see fit to take him and remove him some place else.

Q. The foreman? A. Yes, sir; and they are often advised by the master mechanic in that respect.

Q. Did you know that engine 212 which he run on that night? A. Yes, sir.

Q. What kind of an engine was it? A. What we call a mogul.

Q. Were you there when these photographs were taken of those chutes? A. I was there when they had the machine there, but I have not seen any photographs.

Q. But you were there when the photographs were taken? A. Yes, sir.

Q. When the man was there taking the photographs, were you there? A. I supposed he was taking photographs. I have not seen any.

Q. I will ask you if you were there and saw the chutes when he was there taking the photographs, and that engine; what kind of an engine was it? A. Mogul.

Q. Was it like the other one? A. No, sir; not exactly. This is a little larger engine.

Q. I will ask you to look at these photographs, Mr. Bramley. There is one that is marked "No. 1;" I will ask you if that correctly represents those coal chutes at the time that the photograph was taken? A. It represents the coal chutes at the time the photograph was taken; yes, sir.

Q. It does? A. Yes, sir.

Q. You were there at the time they were taken? A. Yes, sir.

Q. No. 2. I will ask you to state if that is the apron of chute No. 11 down. I will ask you if that is correctly represented. If that is the situation they were in at the time that photograph was taken? A. Yes sir; that is the situation, with the engine set to the coal chutes as at the time they were taken.

Q. Does that represent the correct position? A. That represents the correct position of the apron and the men standing there.

Q. Of No. 11? A. Yes, sir.

Q. And you were there when the photograph was taken? A. Yes, sir.

Q. And No. 3; I will ask you if that correctly represents the situation at the time that was taken? A. That represents the situation at the time it was taken.

Q. Does it correctly represent the position of the apron? A. Yes, sir.

Q. And its position with reference to the cab? A. Yes, sir.

Q. This is the first time you have seen these, I believe, you say? A. Yes, sir.

Cross-Examination, by Mr. Pratt.

Q. How long ago were these taken? A. I do not remember the date.

Q. Well, about? A. Oh, they were taken—I cannot tell you whether it was—

Q. Six weeks? A. They were taken inside of six months.

Q. Who was the artist that took them? A. I do not know, sir.

Q. Where was he from? A. I do not know that. He said he was from Newark.

Q. You do not know his name? A. No, sir.

Mr. Collins—His name is Chase. It is on the back somewhere.

Mr. Pratt—Q. They did not tell you who took it, and you say you do not know? A. No, sir.

Q. And never have seen him since? A. No, sir.

Q. And you say you never have seen these until today? A. No, sir.

Q. Do you know where he placed the instrument at the time he was taking these? A. Yes; he placed the instrument there beside the track.

Q. Was the instrument placed lower or above the chutes? A. Do you mean the top of the chutes? It was on the level with the bottom of the chutes. On the level with the same ground.

Q. About how far distant? A. About fifty or seventy-five feet.

Q. This Exhibit "No. 1"; now just look at that. Just look at Exhibit "No. 2." Where was the instrument placed when that was taken? A. About the same place.

Q. About the same place? A. Yes, sir; same place.

Q. And "No. 3," this one? A. Yes, sir.

Q. Placed at the same position? A. Yes, sir.

Q. And you were there all the time and saw it; is that so? A. I was there when they were taken.

Q. Can you tell them how it is that in "No. 1," the coal chutes—the hight of these posts is very much more than the hight of the same posts in the other pictures? A. I do not know, unless the engine shaded it.

Q. The engine hides a part of that, but there where you look straight over, the engine does not shade it at all? A. The engine has cut all the posts there with the exceptions of one or two that you can not see.

Q. But this one that you can see. Can you give us any reason why that post there is about half as high or two-thirds as high as the posts in this other picture? A. All the difference I can see is the light under the chutes; the engine has

got the light from under the chutes blinded; that is all I can explain of that.

Q. If it was in the same position, can you tell how the light could possibly affect it in one case and not in the other, so that here in "No. 1" the whole thing should appear to be a great deal higher than that is; the coal chute a great deal higher up than it is in the other picture? A. It is all done by the light.

Q. Are you a photographer? A. No, sir; but that is my belief.

Q. Have you any knowledge or any means of judging as to why these differences are? A. Only from the light, is all I can say.

Q. What condition of light would make that change? A. Well, the light would show through there a great deal brighter and clearer, and this engine has got the shades so thick that you cannot see but one post.

Q. You think that shows correctly the height of the engine? A. As far as the photograph goes.

Q. If you should take that engine and put it on this picture, instead of the man standing there being down where his body would be struck, he would be up so high that it would not hit him at all, wouldn't it? A. No; I don't think it would.

Q. Look at it. You say you never have seen them before. Isn't the hight below the coal chute much higher where there is no engine than where there is an engine? A. I cannot see anything that makes it, only the light.

Q. It is higher, isn't it? A. I do not know as it is much higher.

Q. Look at it. A. It is not higher; it only looks higher, that is all.

Q. Isn't the whole thing here to show how it looks? Isn't that what a photograph is for, to show how it looks? A. That is what it is for.

Q. Now, then if that looks to be twice as high as this, will you say that it is higher? A. When that was taken?

Q. Yes; when that was taken. A. The chutes is just the same.

Q. And you say the instrument is just in the same place? A. I said near about.

Q. What do you mean by near about? A. I do not remember of seeing them move the instrument.

Q. Can you say they did not move it? A. I can say I did not notice them move it. I did not see him move it.

Q. And you say that this correctly represents the height of the coal chutes? A. That shows the coal chutes.

Q. Will you say that if this correctly shows the height of the chutes that "No. 2" correctly shows the height of the chutes? A. That chute looks natural, and so does that, but I should say that that engine standing there might make it appear higher, but the chutes were just the same.

Q. And this coal chute is in fact about how high, the top of it? A. I don't know exactly; somewhere in the neighborhood of twenty-two feet.

Q. Isn't it thirty feet? A. I don't know, indeed. Never measured it.

Q. You have been an engineer for some years; an engineer on the Baltimore & Ohio road, have you? A. I have run engines on the Baltimore & Ohio road.

Q. About how high is the smoke-stack on engine 212, on the mogul engine? A. It runs somewhere between thirteen and fourteen feet

Q. Now, this picture here, "No. 2," doesn't that picture show the smoke-stack there to be two-thirds or more of the entire height of the coal chute? A. Let me see both of them.

Q. Wouldn't this engine appear to be—if this coal chute is thirty feet high, wouldn't the top of the engine apper to be at least twenty feet high? A. No; the engine is not twenty feet high. I don't know the height of the chutes. I did not say the chutes are thirty feet high.

Q. Suppose the chute to be thirty feet high; how high would that show the smoke-stack of the engine to be? A. Somewhere about twelve or fourteen feet.

Q. On that picture? Now, sir, do you, upon your oath as a witness, looking at that picture, say that if the coal chute is thirty feet high, that that smoke stack on that engine don't appear upon that picture to be more than twelve or thirteen feet? A. Did I say the coal chute is thirty feet high?

Q. My question is, suppose the coal chute is thirty feet high; does that picture, make from its appearance, the top of the engine to be at least twenty feet high? A. If it was, you say—

Q. Yes, sir. A. I don't know how to answer that question.

Q. You are testifying here that this shows correctly the position of these things as they were at that time. And if you are competent to tell that, you are competent to answer my question. A. That picture there shows a little higher than half the coal chutes, but not two-thirds of it. I don't think it shows two-thirds.

Q. How near two-thirds? A. Oh, I don't know.

Q. Look at the numbers upon "No. 1," and the numbers of the coal chutes there. What proportion of the height are these from the ground? A. Indeed I don't know the height of them.

Q. I will ask you, looking at that picture now, which you have said was a correct representation, what does that picture show, with reference to the height of the numbers on the coal chutes, 11, 12, 13, 14, etc., as to the proportionate height? A. Very little over half—

Q. Now, on this picture "No. 2," doesn't the engine, the top of the engine, show above these numbers? A. It shows very little higher than the numbers.

Q. Yes, but doesn't it show considerable higher than the numbers? A. No, sir; not considerable, just a very little. Five or six inches.

Q. Don't it show two or three feet? A. No, sir.

Q. Now, Mr. Bramley, I understood you to say, a moment ago, that Mr. Gunther, when he hired men, hired them to do certain things? A. He hired them as laborers to do anything.

Q. Hiring men generally, didn't he hire them to do certain things? A. Certain things is every thing that you have got to do; that is the only way men are hired. Men are hired for laboring, and sometimes they are placed with these hostlers.

Q. If Mr. Gunther placed a man in any position, could you, as foreman, overrule Mr. Gunther? A. If the man did not fulfill their duty, we could replace him, and notify Mr. Gunther.

Q. Then wouldn't your power be limited to reporting to Mr. Gunther if the men did not fulfill their duties? A. If a man didn't fulfill his duty, I sent him to the office.

Q. And isn't that the extent of your authority under Mr. Gunther? A. Yes, sir.

Q. Then whatever Mr. Gunther did, neither you nor any other man there at Chicago Junction could overrule? A. Not outside of Mr. Harrison.

Q. Did you ever go to Mr. Harrison over Mr. Gunther's head? A. Did I ever go to Mr. Harrison over Mr. Gunther's head?

Q. That is the question. A. No, sir.

Q. Did you know of anybody else there, occupying any position, ever going to Mr. Harrison over Mr. Gunther's head? A. In what respect?

Q. In any respect? A. No, sir.

Q. Whatever Mr. Gunther then did, so far as any of the men there were concerned, hostlers or anybody else, whatever he did, was the law was it not? A. Mr. Gunther made a statement. There was a statement made out of every man that was discharged, and sent to Mr. Harrison, of the cause.

Q. You made no statement and sent to Mr. Harrison? A. No, sir.

Q. You went simply to Gunther, and Gunther went wherever he was a mind to, and where Mr. Harrison went, you do not know. Now, upon that night when you were foreman, did you give instructions to Mr. Lewis or Moore or Sutherland, in reference to this matter here in question? A. In regard to his getting hurt?

Q. Anything in connection with what was done that night? A. After Mr. Sutherland had been hurt they came up—

Q. No matter about after he was hurt; before he was hurt, you did not give any instructions to Lewis or Sutherland before he was hurt? A. I don't remember of any.

Q. Did you, at any time, ever give any instructions to Mr. Sutherland, while he was working there during that time, in January, 1882? A. No, sir; I was the only one on there that night. I think I was only on one night, and that was the night he was hurt. I might have been on a night or two, but I don't remember.

Q. Who was on? A. Mr. McMullen was the regular night foreman.

Re-Direct Examination, by Mr. Collins.

Q. When you received notice that Mr. Sutherland had received an injury, state whether you went to the engine where he was? A. Yes, I went right direct to the engine as soon as possible.

Q. Did you have any conversation with him at that time as to how this accident occurred? A. When I went to him, I asked him what was the matter, and he said he had his leg hurt. I asked him where, and he showed me, and put my hand on his knee, or somewhere near about the knee, and I saw that it was swollen pretty bad, and I asked him how it happened, and he said it was an accident.

Q. He said it was an accident? A. Yes, sir.

Re-Cross-Examination, by Mr. Pratt.

Q. Were you asked about this on the former trial of this case up at Toledo? A. I don't remember whether I was or not.

Q. Don't remember whether you testified anything as to this, at Toledo, or not? A. No, I don't remember.

Q. When did you first speak of this to anybody, so far as you now remember? A. Sir?

Q. When did you first tell anybody of this remark made at that time? A. I was asked last night if I had any conversation with him after he was hurt, and I said that was all.

Q. That was the first that you had said anything to anybody about it? A. Why, as I remember, yes, sir.

Q. And you remember now, so that you can tell the words that he spoke in 1882, eleven, almost twelve years ago? A. That was the conversation between him and me.

Q. And all— A. That was the conversation.

Q. And you remember it now at this time? A. I remember that; yes, sir.

Q. Did you ever tell anybody else before last night of this conversation? A. Oh, I might have told others at the time of the accident, but I don't just remember that.

Q. Was anybody present when this was said? A. Why, he was present, and this man George was present; and I think the man that told me, he followed me right down there.

Q. The man that told you? A. The man that come to the round-house and informed me of the accident followed me right down there.

Q. And this was all that was said; what you have told is all that was said? A. That is all that Sutherland said to me.

Q. That was all that was said in the presence of the other man and in your presence? A. Yes, sir.

Q. That was all that was said when you were present, about it? A. Yes, sir; all he said.

Q. And this was right after the accident, while he was sitting there with his leg in that condition, mashed? A. When he was sitting there on the coal pile.

Q. And what you have said is all that was said. Now, that is clearly understood, what you have said now, is all that was said between you and him at that time, or any other time? A. That is all that was said between him and I at that time on that engine.

EDWARD LEWIS,

being duly sworn, testified as follows:

Direct Examination, by Mr. Collins.

Q. Where do you live? A. I live in Chicago Junction, Huron county, Ohio.

Q. What is your business? A. Engineer.

Q. What was your business in January, 1882? A. I was hostler on the Baltimore & Ohio Railroad at Chicago Junction.

Q. Where? A. Chicago Junction, Ohio.

Q. Do you know William Sutherland, the plaintiff? A. Yes, sir; I do.

Q. When did you first become acquainted with him? A. I could not tell you, just exactly. It was some time before the accident happened.

Q. Were you on the engine on the night that this accident happened? A. Yes, sir.

Q. Was Mr. Sutherland there? A. Yes, sir.

Q. How long was that after he went to work? A. What do you mean?

Q. At that time, how long was it that the accident happened after he went to work? A. He went to work at six o'clock in the evening, and it was somewheres near midnight when the accident happened.

Q. How many days before that had he been at work? A. I could not tell you how long he had been at work.

He might have been working a month or two; I could not tell about that.

Q. Do you know how long he had been working on the chutes? A. No, sir; I could not say.

Q. What, if any, control did you have over Mr. Sutherland? A. Nothing at all.

Q. You had no authority over him at all? A. None at all, sir. Had not that night or any other time.

Q. I will ask you to state whether or not you had any control or power over him that night or any other time?

(To which question the plaintiff objected.)

A. I had no control over anybody at all. They was all under the night foreman of the round-house.

Q. They were all working there under the control of the night foreman? A. All under him the same as I was, every bit.

Q. Who was the night foreman that night? A. William Bramley.

Q. The gentleman who was just on the witness stand? A. Yes, sir.

Q. And you were all under his control? A. All under his control; every one of us.

Q. I will ask you to state how this accident happened. A. Well, sir, as near as I can tell, we was taking coal at pocket No. 11, and I was on the tank helping to take coal, and Mr. Moore was on top of the chutes. Mr. Sutherland was next to the cab, and I was on the west side of the pocket at the back end of the tank. I had fastened up the pocket and asked Mr. Moore where we could get about twenty or twenty-five bushels of coal, and he said at No. 8.

Mr. Walker—Q. How is that? A. I asked Mr. Moore where we could get twenty or twenty-five bushels of coal, and he told me, "back to No. 8." And I said to Mr. Sutherland, "when you are ready, tell me, and I will back back." I went inside of the cab, and he said "all right, back up;" and I started back, and when he struck the cab, I felt the jar of the cab at the time and threw the engine ahead, shut her off and moved

ahead, and I ran out to ask him what was the matter, and he said, "you have caught my leg," and I asked him what he said "all right" for, and he said, "you have crushed my leg. I forgot the apron."

Mr. Walker—Q. Repeat what he said. A. I asked him what made him say "all right," and he said, "I forgot the apron."

Mr. Collins—Q. I want you to state again what it was that caused you to take back the engine. Before you started, what did he say? A. He said, "all right, back up."

Q. And you did back up? A. I backed up.

Q. What was said after he was caught? A. He said to me, after he was caught,—I shut the engine off and moved ahead, and when I went out he was partly on the cab and partly over the apron, and I said, "What is the matter, Bill?" And he says, "You have caught my leg." And I said, "My God, what did you tell me to back up for?" And he said, "I forgot the apron."

Q. Did you have any other talk with him that night? A. Well, once, but I was threatened so badly that I did not dare—

Q. What was that? A. I did once, but I was threatened so badly I did not dare to go around any more.

Mr. Walker—Q. How is that? A. I did once afterward. That was at his home.

Mr. Collins—Q. I was asking you about that night? A. Nothing said afterwards that night, except what I have told, nothing in particular.

Q. Where was his lamp? A. Sitting on top of the cab.

Q. How far back? A. I could not just exactly tell. It was sitting on the cab, right by his side.

Q. And where was he when you stopped the engine and went out to him? A. He was leaning up against the apron and the cab, with one foot on the box, tool-box on top of the tank.

Q. Was he sitting any place? A. He was leaning with

his back--kind of leaning over on the apron and the back of the cab, with one foot on the tool-box on the tank.

Q. Where was Peter George that night? A. Sitting on the left-hand side of the engine.

Q. At the time that you moved it? A. Yes, sir.

Q. What was his business? A. He was firing the engine.

Q. He was firing the engine when it came in? A. Yes, sir.

Q. He was the road fireman? A. Yes, sir.

Cross-Examination, by Mr. Pratt.

Q. Mr. Lewis, you took the engine when it came in off its run, I suppose, on the side track, that night? A. I took it; yes, sir.

Q. And you were the engineer upon the engine? A. I was hostlering.

Q. But who run the engine? A. A man by the name of Hoobler was the engineer.

Q. Who run the engine while you were on it? A. I was running the engine while I was on it.

Q. Was there anybody else? Was there any conductor? A. No.

Q. No conductor? A. No conductor.

Q. The engineer that had come in with the engine had left? A. Yes, sir.

Q. And the fireman, you say, was George. But whether he was on the engine or not, his duties had ceased, hadn't they? A. Yes, sir.

Q. Then you were the only person that had charge of the engine, were you not? A. I had charge of the engine, yes, sir.

Q. What were you to do with that engine? A. Give it coal, give it sand, give it water, clean the fire, and put the engine in the house.

Q. In order to do that, what was it necessary for you to

do? You took the engine, now, on the side track; what was the first thing that was necessary for you to do, performing that duty? A. Go by signals of somebody else.

Q. Any difference, so far as that is concerned, from a conductor on a railroad train, going by signals that he receives from the brakeman? A. Not a bit of difference at all. They were supposed to do the same thing. That is the way I always worked it.

Q. That is to say, you take the railroad train when it stops at the station; the brakeman goes out, and he halloes to the conductor, "all right," and the conductor goes by this signal; and you went in the same way, did you? A. I went in the same way.

Q. On the question of the moving, you were the only person that could move the engine, were you not? A. I was placed there for that purpose.

Q. And you had two helpers, did you not, in doing this work? A. Yes, sir.

Q. And those two helpers were Sutherland and Moore? A. I believe so, yes, sir.

Q. And you took the engine, and run it back, or forward, which way was it? A. I run it both ways.

Q. But first. A. I could not tell you just where I did move it first. I moved it ahead the first time to move it up to the coal chute.

Q. Did you move it to any particular pocket? A. Pocket No. 11.

Q. And when you got to No. 11, the pocket was let down, was it? A. Yes, sir.

Q. Where were you when the apron was let down? A. I was up on the top of the tank.

Q. Who else was on top of the tank? A. Sutherland.

Q. When the apron was let down, what did you do? A. We opened the pocket and let the coal out.

Q. Who is "we"? A. Mr. Sutherland and myself. He let down one side and I let down the other.

Q. Then you went down into the engine? A. Yes, sir.

Q. Down into the engine, down to the lever? A. I got down off the tank, yes, sir.

Q. When you got down off the tank, where was Mr. Sutherland standing? A. He was on the apron when I got off the tank.

Q. Did you see him after you left him there on the apron until he was hurt? A. No, sir.

Q. You were down in the engine all the time from the time he was on the apron until the time the engine was started, at any rate? A. Yes, sir.

Q. Whereabouts was he standing on the apron? A. He was standing on the bottom part of the apron, the lower edge of it.

Q. On this. (Indicating on model.) Supposing that the apron is this, or like it; he was standing on this piece? A. There is no supposition about it. That is nothing like it.

Q. Was he standing at the bottom or on this piece? A. He was standing on the cross-piece below there.

Q. In that respect then, it is something like it. A. The cross-piece is.

Q. And he was standing on that cross-piece? A. Yes, sir.

Q. On which foot was he standing? A. I could not tell.

Q. Can you tell where his other foot was? A. I could not tell that.

Q. When you got down into the engine, what was the first thing that you discovered, if anything? A. I did not find out anything. What do you mean?

Q. Wasn't there something the matter with your engine, or with the steam? A. Nothing the matter with the steam that I know of.

Q. How much steam did you have? A. I had enough; eighty pounds or somewhere along there. I had enough steam.

Q. You have testified in this case before? A. I have.

Q. Up at Toledo. A. I had eighty pounds of steam, or something like that.

Q. You testified in this case at Toledo. Didn't you say there in answer to a question by counsel for the railroad company, "I got down off from the tank and looked into the fire box. I seen my fire was about out and had only forty pounds of steam." A. I don't recollect just how much steam we did have. We had enough steam after the accident occurred to take the engine to the house.

Q. Didn't you testify to that? A. I don't recollect of anything—

Q. Wasn't that the fact? A. I do not know as it was.

Q. Do you know now? We had about eighty pounds of steam. I do not know just how much steam we did have, but we had enough steam.

Q. Did you say anything to Mr. Sutherland after you got down into the engine before he was hurt? Did you say anything to him? A. No, I don't recollect that I did say anything to him.

Q. Didn't you say to him, "we have got to hurry and get this engine in order to keep from punching her in"? A. Pinch her in. I told him that—

Q. Then you did tell him something? A. I think that was before we got on to the engine, before the accident happened.

Q. This was after you had gone down into the engine, got down from where Sutherland was, and you told him that while you were down there? A. I think I told him before. I would not be positive. I think I told him before that we would have to get her in, that the fire was about out. I do not recollect how much steam we had.

Q. But you say you had plenty of steam? A. We had plenty of steam to take her in.

Q. You did tell him that you would have to hurry up? A. That we would have to hurry, and get her in. It was just as much his benefit as mine.

Q. Now you say that was all before you had any signal from him? A. All before I had any signal from him.

Q. Isn't this the fact? that when you got down there and

found that you only had that amount of steam, didn't you try to do something with what is known as the relief cups? A. Not until I got the signal, sir.

Q. Isn't it true that you undertook to shut those off with your foot? A. I never tried to shut them off with my foot, because I could not reach them. Your advisor can show you. He has got the engine.

Q. How long was it after you got down in there before you say you heard this word from him, "all right"? A. I do not know. I could not exactly tell.

Q. Was it almost immediately? A. No; it was three or four, or five minutes perhaps.

Q. Three or four, or five minutes? A. Yes, sir; I don't know just exactly how long it was. It was time enough for me to go down and go inside of the cab and stand there, speak two or three words to the fireman. He said he wanted to get his oil before he went to bed.

Q. I am not asking you about the conversation. A. I am giving you the time as near as I can, and you can judge for yourself.

Q. You were on the right-hand side? A. Yes, sir.

Q. This engine that you were on, was there an open space between it and the tender, or was there a door? A. An open space between them.

Q. Wasn't there a door? A. I guess there was, but I do not know. I do not recollect.

Q. Didn't you testify on the former trial that there was a door there? A. I think there was. I think there was a door behind.

Q. Was this door open or closed? A. I think it was open.

Q. You do not remember distinctly? A. I do not remember distinctly whether there was or not.

Q. Did you have any trouble in undertaking to close these relief cups? A. Yes, sir.

Q. Did you do that before you put your hand on the lever? A. Yes, sir.

Q. Did the relief cups close? A. No, sir.

Q. Now, what would be the effect of the relief cups not closing? A. Nothing; only make a great noise; but any body could understand that the engine was moving.

Q. Anybody would understand that the engine was moving? A. Yes, sir.

Q. Did you have your hand on the lever when you undertook to close the relief cups? A. No, sir; I could not reach it.

Q. You had two hands? A. Yes.

Q. Which hand did you use on lever? A. Which lever did you mean.

Q. The engine—the one that makes the engine go? A. The throttle. My right hand. Use it with both, so far as that is concerned.

Q. Which hand did you use with the relief cups? A. Use either one.

Q. You can't tell which you did use? A. No, sir; I can not.

Q. Do you know that this "all right" came from Mr. Sutherland? A. I certainly did. Nobody else around there but Mr. Moore, and he was on top of the chute.

Q. Might it not have come from Mr. Moore? A. I could not tell you; but Mr. Sutherland said himself that he said it, and that is all I know about it.

Q. Mr. Sutherland said it, when? A. Right on the tank when he was hurt.

Q. Didn't you say this in the former trial, when Judge Doyle asked you the question: "You are certain that it was Sutherland's voice that said "All right," and wasn't your answer this: "That I don't know anything about; I don't know whether it was Sutherland's voice or not; I took it for Sutherland's voice"? A. I dont't recollect of saying anything of the kind. I told Mr. Doyle at the same time that Mr. Sutherland told me so.

Q. You will not say you did not? A. I do not recollect that. I remember just exactly what I did tell—

Q. Wasn't it a fact that you could not tell? A. I was supposed to go by signals, and that man gave me the signal.

Q. And you got the signal from him? A. There was nobody else around.

Q. How far was Moore from you? A. He was, you may say, almost as high as this ceiling, away back over three pockets.

Q. How high up was he? A. I don't know just exactly. I don't know how high the chutes are.

Q. They are about thirty feet high? A. I should judge; but I have never seen them measured.

Q. They are about thirty feet high; that is what you testified to before, didn't you? A. I expect may be I did. I do not recollect. I could not tell just exactly how high they are. About thirty feet; somewhere in that neighborhood.

Q. After this thing happened, did you work right along for the company? A. I did for a while; yes, sir.

(To which question the defendant objected.)

Mr. Pratt—Q. I asked him the question whether he continued to work there. I asked him whether he continued to work right along.

Court—He may answer.

(To which ruling of the court the defendant, by its counsel, at the time excepted.)

Q. For how long? A. I could not tell you just exactly how long.

Q. For one day? A. It may have been one day or two days, or three days; I could not tell exactly.

Q. Then you were laid off, at any rate? A. Yes, sir.

Q. How long were you off? A. I could not tell you that.

Q. You were off about a month were you not? A. Yes; I think about a month.

Q. After you came back after you had been off, did you have any conversation about this transaction with Mr. Bru-

baker in Mr. Brudge's presence? A. No, sir; don't recollect of anything of the kind.

Q. In the sand-house? A. No, sir; don't recollect of anything of the kind at all.

Q. A short time after you were reinstated, within a week, or probably about the third or fourth night after you were reinstated, did you have a conversation about how this accident occurred, in the presence of Mr. Brubaker and Mr. Albert Burdge? A. Not as I know of.

Q. You know those gentlemen? A. I do.

Q. And knew them at that time? A. I knew them at that time.

Q. You say you did not talk with them at all? A. I do not recollect of anything. I do not say I did not, but I do not recollect.

Q. In that conversation, didn't you say to them, in words or in substance, that you attempted to start the engine, got ready to start it; that you moved to shut the relief cups, undertook to shut the relief cups, and could not, and while doing that you threw the throttle wide open? A. No, sir.

Q. Did you say anything of that kind? A. I said nothing more than this: I said I tried to start the engine and the relief cups were open, and I tried to shut them, and I found that the rod was bent, and that I had to get out to shut it off, and I says, "I only have to back back to No. 8 anyhow, and I will leave them open until I backed there," and they were open, and it moved about three feet, and he heard it at the same time. If a man in his position knew that everything was not right, he certainly could have heard the steam. I moved the engine back with the relief cups open.

Q. You moved it back until he was caught, with the cups open? A. Yes, sir.

Q. Didn't you, in doing that, throw the throttle wide open? A. No, sir; I did not.

Q. At this time at the sand-house, (at the time I have named), didn't you say to Mr. Brubaker and Mr. Burdge, or

in the presence of them, "I will just tell you how it happened?" A. I don't recollect whether I did or not.

Q. Didn't you say that to them? A. No, sir.

Q. Sure you did not? A. I know I did not.

Q. And didn't you say to them there, that Mr. Moore had got up on the coal chute to find some more coal, and said there was not enough in the pocket they let down; and didn't you say you had the relief cups open and tried to shut them with your hands and could not; that you had your hand on the throttle and wanted to shut the relief cups with your foot and that the throttle went wide open, and that you heard no signal at all until you heard Sutherland say, "pull ahead, you have caught me?" A. No, sir.

Q. Did you say anything like that? A. I said that the relief cups was open, and that Moore was on top of the chutes; just exactly the testimony that I have given here.

Q. Was that all that you said? A. Yes, sir.

Q. Didn't you say, in words or in substance, the rest of this matter that I have stated to you? A. No, sir; I never said anything about putting my foot on the relief cups.

Q. Did you say anything about the throttle going wide open? A. No, sir; it was not necessary to open the throttle.

Q. Did you say to them that you did not hear anything until you heard him say, "Move ahead, you have caught me, you have caught my leg?" A. No, sir.

Q. You say you did not say that in words or substance? A. No, sir.

Q. And did not say to him that you would tell just how the thing happened? A. I have told you exactly how it happened.

Q. Did you say that in the presence of these men, or either of them? A. No, sir; neither of them.

Q. Now, you were up on the tender or tank, whichever you call it, and it is the same, I suppose, and Moore was—and Sutherland was standing on this piece on the apron, and you

went down into the engine? A. I got off the tank; yes, sir.

Q. Did you go up again on to the tank or tender, out of the cab-house, before Mr. Sutherland was caught? A. I do not recollect that I did; I do not think I did.

Q. And when you went down there, of course, the pocket was not closed? A. The apron was not up; no, sir.

Re-direct Examination, by Mr. Collins.

Q. I understood you to say, in answer to Mr. Pratt's question, that something about what Mr. Sutherland said to you about having given the signal after he was hurt; who was that? A. He told me that he forgot the apron.

Q. What did he say about giving the signal to move? A. He said it was all right; that he gave the signal all right, and I took it from that he said he forgot it. I supposed that he had given it, of course.

Re-Cross Examination, by Mr. Pratt.

Q. I understand you to say that he said, after he was hurt, that he had given the signal? A. That is what he said to me.

Q. I understood you to say, a moment ago— A. He said to me just exactly this way: I said, "For God's sake, what did you say 'all right,' for; what did you say 'back up' for?" And he said, "I forgot the apron."

Q. Did he say "all right," or "back up?" A. He said "all right, back up."

Q. You said before that he said "all right." A. It is the same signal, ain't it?

Q. Did he say both of them? A. I don't recollect whether he did or not.

Q. Did he say both of them to you? A. I don't know whether he did; I would not say. It was just the same thing. That is the way we work, and I do not know just exactly what he said. I could not tell just exactly what he said.

Q. Whether it was "all right," or whether it was "all right, back up?" A. I got the signal.

Q. In your examination at Toledo, did you say anything about his saying that he forgot the apron? A. I don't recollect that; I don't recollect whether I did or not.

DR. E. H. YOUNG,

being duly sworn, testified as follows:

Direct Examination, by Mr. Collins.

Q. Where do you reside? A. Chicago Junction.

Q. What is your business? A. I am a physician.

Q. How long have you been practicing? A. Since the Spring of 1871.

Q. How long have you been at Chicago Junction? A. Since the Spring of 1877.

Q. Did you see Mr. Sutherland after this accident on the night of January 31? A. I did.

Q. Where did you see him? A. The first place I saw him was in the yards just outside of his house. That was some time after midnight.

Q. Did you not go with him into the house? A. Yes, sir.

Q. What did you do when yon went in? A. We laid him on a little cot that was in the house, in the kitchen, and then I went up stairs and woke his wife up, and told her that William had his knee injured, and that we wanted some fire and hot water to look after him.

Q. Then what did you do? A. I came down stairs, and some of the force had built a fire by that time, and I proceeded to look after him and see how he was injured.

Q. I will inquire what is the first thing you did. Did you inquire of him how it occurred? A. Not especially at that time. I presume I asked him how he was hurt. I asked him how he was hurt, and he told me that his knee had been hurt.

Q. Did he at that time go into details in order to tell you how it did happen? A. Not at that time.

Q. At any time? A. Yes, sir.

Q. When was that? A. Some time during the night after we had got him comfortable, and he was resting easier from the injury. I was with him at the time; I had staid with him, and his wife had gone—

Q. Who else was present? A. Nobody.

Q. Go into details and tell the jury fully what he said to you. A. I asked Mr. Sutherland how he got hurt. I was sitting alongside of the cot, and I asked him in what position, how he got hurt. He said that he was up coaling the engine up, and they wanted to go from one pocket to another one, and he was sitting on top of the cab of the engine, something in that position (indicating), and the apron caught him, caught the knee on one side and the top of the cab on the other, and broke it.

Q. What did he say about the moving of the engine? A. He did not say anything. He said that it was an accident, and that there was nobody to blame.

Q. You examined the wound, didn't you? A. Yes, sir.

Q. I will ask you to state to the jury whether your examination of the wound indicated how it happened. A. The only appearance that I could see was that there had been two opposing forces applied on opposite sides of the knee.

Q. At these same points? A. No, sir; at different points.

Q. Where were the two opposing forces? A. One was a little above the knee and one a little below.

Q. State to the jury whether that coincides with his description of how it occurred? A. Yes, sir.

Q. Did he sit up when he showed you how it was he was sitting on the cab? A. No, sir. He was not able to sit up, but he told me how it was, he directed me how to place myself, how to place my leg against the chair, and explained

to me how he was hurt. I had asked him this question and tried to reason out the character of the injury, how the force was applied to produce the injury.

Q. I will ask you to state whether his description of how it occurred coincided with your diagnosis.

(To which question the plaintiff objected. Objection sustained.)

Q. You have said what Mr. Sutherland said, now give your diagnosis? A. I diagnosed a fracture of the head of the *tibia*, the lower leg bone.

Q. State what your diagnosis was as to how it happened. A. It must necessarily have been produced by a great force applied in two opposite directions.

Q. What position was the leg between the two opposing forces as you diagnosed it? A. It must, from the character of the injury at that time, and the appearance, it must have been caught very close to the knee joint, both sides.

Q. Did you talk with him after that at any other time about how it occurred? A. I cannot just recollect that I talked with him. Of course I took care of him during his whole confinement to the house.

Q. Who was present at the time of this conversation? A. Mr. Sutherland and myself were present. There was nobody else in the room.

Cross-Examination, by Mr. Walker.

Q. Doctor, you were there and met that man in the yard? A. Yes, sir.

Q. You had got there before he did? A. No, sir.

Q. He was on a flat car at the nearest point of the railroad to his yard? A. I think possibly they may have got him in his own yard At least, when I got there, I took the key of the door out of Mr. Sutherland's pocket and opened the door for them to go into the house.

Q. Did you assist them in taking him off the car? A. I think not.

Q. He was then brought into the house? A. Yes, sir.

Q. Did he at that time go into details in order to tell you how it did happen? A. Not at that time.

Q. At any time? A. Yes, sir.

Q. When was that? A. Some time during the night after we had got him comfortable, and he was resting easier from the injury. I was with him at the time; I had staid with him, and his wife had gone—

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Q. Did you assist them in taking him off the car? A. I think not.

Q. He was then brought into the house? A. Yes, sir.

Q. And you then simply called Mrs. Sutherland, and she came down, did she? A. I went up stairs and wakened her up, and she came down.

Q. And preparations were made for taking care of the limb? A. Yes, sir.

Q. How long were you engaged in getting hot water and dressing the limb? A. I cannot say just the number of minutes; it was not very long.

Q. About what time in the evening or night was it that you got there? A. Sometime after midnight, about two o'clock; somewhere about two o'clock; sometime after midnight.

Q. How long did it take you to give this attention, get hot water and other appliances and take care of the leg? A. Probably half an hour after we got the warm water.

Q. How long did it take to get the warm water? A. I do not know.

Q. Can you form any opinion about it? A. As quick as they could get a fire built.

Q. About how much time was consumed, in your judgment, in getting the hot water? A. Probably half an hour.

Q. Then it took you half an hour to get the limb quiet and fixed? A. To make the examination and find out how it was injured.

Q. Did you make an examination at that time? A. Yes, sir.

Q. Had the leg begun to swell? A. It was enormously swollen.

Q. You say that the injury appeared to have resulted from opposing forces applied to the leg from opposite sides? A. Yes, sir.

Q. What part of the leg was struck on the two sides? A. On the inner side of the leg there was a slight bruise just below the enlargement of the *tibia*, the lower leg-bone, and on the opposite side—

Q. *Tibia* is the large bone that runs from the knee down to the ankle? A. Yes, sir.

Q. And it was on the inner side? A. Yes, sir.

Q. Do you mean between the limbs or on the back side? A. The inner side is between the two limbs.

Q. This is what you mean by the inner side. Was the force or the bruising on the outside of the leg also? A. Yes, sir.

Q. Then it was on the inner and outer side that the force came? A. Yes, sir.

Q. Not the front and back? A. No, sir.

Q. Was it bruised below the knee? A. There was on the back of the leg a slight opening in the skin, where there was some oozing of blood.

Q. On the side or on the back of the leg? A. On the back of the leg, right under the knee.

Q. Was that a place where force had been applied to it? A. No, sir.

Q. How was that produced? A. That was produced by a sharp edge of the bone.

Q. Then the bones were sufficiently crushed that they lacerated the flesh? A. Yes, sir.

Q. And protruded through the skin so that the blood oozed out? A. No, sir.

Q. No, sir? A. The bones did not protrude through the skin.

Q. What produced this abrasion of the skin and opening so that the blood came out? A. It was done by a sharp edge of the lower fragment of the bone. It did not protrude through the skin.

Q. Did it cut the skin? A. Yes, sir.

Q. But not so as to protrude? A. Not so as to protrude.

Q. Did you examine it at that time so as to ascertain the condition of the bone, the *tibia*? A. I examined it enough to know that there was a comminuted—that the *tibia* was broken into several pieces.

Q. You do not mean comminuted? A. It was a comminuted fracture.

Q. It was? A. Yes, sir.

Q. How was it about the splintering or crushing of the bone? A. The bone was not badly crushed, but it was broken into several fragments.

Q. What do you mean by comminuted? A. Where the bone is in several pieces, or crushed.

Q. Isn't it rather this; where they are shut together; driven through each other? A. Not where they were driven together. That would be termed impacted fracture.

Q. But this was slivered, splintered and crushed? A. There was not any crushing. It was simply slivered into several fragments. The bone was not crushed, but simply slivered into several fragments.

Q. How was it about the knee joint? A. The injury extended into the knee joint.

Q. Was the knee joint affected by crushing in any respect? A. No, sir.

Q. Was the bone split? A. The head of the lower bone was split,

Q. Clear up into the joint? A. Into the joint; yes, sir.

Q. To what extent was it split; was it simply a sliverep or a splitting of the bone? A. The head of the *tibia* was broken into three different parts.

Q. Did those fractures extend up into the joint? A. Yes, sir.

Q. How was it above the knee? A. There was not any injury to the *femur* or the upper bone.

Q. No injury to the *femur*? A. No fracture, no.

Q. Well, about how long was it before this limb got quiet? A. I gave him some morphine, I think about a quarter of a grain of morphine, and he quieted down in about an hour from the pain he had suffered.

Q. About an hour after you came there, after he was brought home? A. An hour and a half, I think. It took some little time before I could administer the morphine to him, and took some little time to get him quiet.

Q. How many doses did you give him? A. One.

Q. Was that a large dose? A. I gave him a quarter of a grain.

Q. Is that a large dose? A. No, sir; not in cases of shock.

Q. Would be a large dose for a man not under the influence of great pain? A. Well, a quarter of a grain would be apt to make him pretty sleepy.

Q. Does morphiue operate the same on all persons? A. No, sir.

Q. Isn't there a wide diversity of effect upon different individuals? A. Yes, sir.

Q. How does it affect some persons that it don't make sleepy? A. Well, it proves to be a violent poison to some. Your friend, Mr. Severance there cannot take it at all.

Q. What other effects are produced on some persons? A. It proves to be an emetic with some. It will vomit some people very rapidly. And some it will produce such shock upon the nervous system that it produces almost a condition of collapse.

Q. Are there not others that it proves a fire-brand to and sets their tongues going? A. Yes, sir.

Q. To talking wildly? A. Yes, sir.

Q. It effects then the brain? A. It sometimes acts as a stimulant.

Q. Its effects are various and very extensive? A. Yes, sir.

Q. And you gave him enough to effect him considerably even when he was suffering with this terrible pain from this injury? A. Not too much. He passed under the influence of it—

Q. Just about what you wanted? A. Very quietly. Kept him from feeling very much pain and kept him so that he was in a nice condition.

Q. In a nice condition to have an interview with, and get these facts out of him? A. No, sir; I do not know that he was in that condition.

Q. You were in the employ of the railroad company? A. No, sir.

Q. At the time? A. No, sir.

Q. Was you not? A. No, sir.

Q. Was you in the employ of anybody besides Sutherland? A. I was one of the physicians that was on the company's list of attendants of the men that were injured.

Q. Then you were in the employment of the company to a certain extent? A. To a certain extent. I was not one of their employes. I was not paid a salary or anything of the kind.

Q. Had you attended other cases for the company? A. Yes, sir.

Q. Then you had a conversation with him when you got him about where you wanted him? A. I do not know as I had any conversation—

Q. When you got him quite under the influence of morphine?

(To which question the defendant objected; objection sustained.)

Q. You had a conversation with him? A. Yes, sir.

Q. In regard to his injury? A. Yes, sir.

Q. Who begun to make the inqury, or did he undertake to tell you how it occurred? A. I could not say as to who commenced the conversation. I simply asked him—

Q. You can not tell that now; that has been too long ago, but you can tell just exactly what was said to you about how this injury occurred? A. Yes, sir.

Q. Now, where did Sutherland say that he was when he was hurt? A. He told me that he was sitting on the top of the cab.

Q. Sitting on top of the cab? A. Sitting on top of the cab.

Q. Will you indicate on your own limb just where these injuries were? A. The injury to the inside of the knee was just below this enlargement of the bone, and above at this

point of the enlargement of the upper bone; these two prominences there.

Q. But I thought you said before that above the knee was not hurt? A. The bone of the upper part of the knee was not hurt, but there was a bruise on the outside of the skin; that was the way I testified at the first. It was bruised on the outside The femur or the upper bone was not injured.

Q. But it was just below the large part of the tibia; just below that? A. Just at that.

Q. Was there any mash or abrasion or bruise directly opposite on the tibia below the knee? A. No, sir; it was above here. Those abrasions were very slight. Those abrasions of the skin were very slight.

Q. Now, Mr. Sutherland told you that when he was injured he was sitting on the top of the cab? A. Yes, sir.

Q. Did he describe to you how the hurt occurred? A. He said he was caught between the apron and the top of the cab.

Q. Did you go to a chair and place your leg in any position so as to get an idea from his statement? A. I was sitting in a chair at the time right at his bedside.

Q. And he was lying on the bed? A. He was lying on a lounge or cot in the kitchen. It was a narrow cot.

Q. And you were sitting there; just tell what occurred, what he said to you. A. He simply put his hand, and motioned for me to turn around, and said that he was sitting in that position (indicating) with one knee hanging down, and the apron caught him between the apron and the top of the cab.

Q. Who else were in the house there? A. There was not anybody in the room but Mr. Sutherland and myself.

Q. Where was Mrs. Sutherland? A. Mrs. Sutherland, if I remember rightly, had gone back up stairs. I told her that I would stay with William until daylight.

Q. How long did she remain with her husband there after she came down? A. She may have remained a half an

hour or such a matter; I could not say as to how long she remained.

Q. You are sure she had gone out of the room before you undertook to ascertain about how he was hurt, and no person but yourself present; that is so, is it, Doctor? A. We certainly were in the room alone when he told me this; the manner that he was hurt.

Q. When he made this statement? A. Yes, sir.

Q. When did you next see her? A. I called her when I got ready to go home.

Q. What time did you go home? A. I think about five o'clock in the morning; between five and six o'clock.

Q. Do you know whether she had gone up stairs and gone to bed? A. I think she had. I would not be positive; but I know that I told her that I would stay with Sutherland till morning.

Q. Did she say she would go to bed? A. I cannot remember that.

Q. She was not in the room from the time she went out about an hour and a half after her husband come home until about five o'clock— A. I could not remember definitely as to the time she was in the room.

Q. How long would you say was the time that she was absent? A. She might have been absent from the room a couple of hours; it may have been that long; I could not say as to the length of time.

Q. But that is your best recollection? A. Yes, sir.

Q. What makes you think you went away about five o'clock? A. Because I told them I would stay with him until morning.

Q. Have you a recollection that you did leave about five o'clock? A. It is generally my habit to get up while I am at home—

Q. I asked you if you had a recollection that you left about five o'clock?

Court—Present recollection.

A. It is my present recollection that I did leave about

five o'clock. My habits of life would make me leave about that time.

Mr. Walker—Q. I did not ask you about your habits of life. I suppose they are good enough. A. I think so.

J. E. RANKIN,

being duly sworn, testified as follows:

Direct Examination, by Mr. Collins.

Q. Where do you reside? A. Columbus, Ohio.

Q. What is your business? A. Special agent of the Baltimore & Ohio Railroad Company.

Q. How long have you occupied that position? A. Over twenty years.

Q. Were you present at the trial of this case at Toledo? A. Yes, sir.

Q. You were there in your official capacity as Special Agent? A. Yes, sir.

Q. Mr. Rankin, did you hear the testimony of Peter George? A. Yes, sir.

Q. What has become of Peter George? A. He is dead.

Q. Mr. Rankin, you may go on and state in detail—do you remember the testimony? A. I remember the substance of it.

Q. You may state what he testified to, in substance.

(To which question the plaintiff objected. Objection sustained.)

(No cross-examination.)

Mr. Collins—I want now to introduce in evidence these photographs, "Nos. 1, 2 and 3." The first, "No. 1," represents the coal chutes with the aprons up. The second, with the apron of No. 11 down, and the third with the apron of No. 11 down.

(To which the plaintiff objects. Objection overruled, and photographs "No. 1," "No. 2" and "No. 3" admitted in evidence, and hereto attached and made a part hereof. To the

admission of which the plaintiff, by his attorneys, at the time excepted.)

Mr. Collins—I now introduce in evidence the paper which Mr. Sutherland identified as being his signature to it, when he was on the stand.

(To which the plaintiff objected.)

Mr. Collins—It is under the second answer. We have a second answer setting up this precise matter.

(Objection sustained, and paper excluded; to which ruling of the court, the defendant, by its attorneys, at the time excepted.)

(Which paper is hereto attached, marked "No. 4," and made a part hereof.)

Thereupon the defendant rested.

And the plaintiff, further to maintain the issues upon his part, called the following witnesses and offered the following evidence in rebuttal:

ALBERT BURDGE,

being so called, testified as follows:

Direct Examination, by Mr. Walker.

Q. Do you remember Mr. Lewis being away from the employment of the Baltimore & Ohio Railroad Company a few weeks after this injury? A. Yes, sir.

Q. Do you remember his coming back into the employment of the company? A. Yes, sir.

Q. I think you said that you took the place of Sutherland three or four days after he was hurt? A. Yes, sir.

Q. Now, state whether you was in the employ of the company, and acting as one of the helpers to the hostler when Mr.—

(To which question the defendant objected.)

Q. State if you was helper when Mr. Lewis came back. A. Yes, sir.

Q. Night helper? A. Yes, sir.

Q. Now, I will ask you if a few days after he came back, few nights, you met him, you and he were together at the sand-house there at the station? A. Yes, sir.

Q. I will ask you if at this time he said to you anything about how this injury occurred? A. He did.

Q. He did? A. Yes, sir.

Q. In your own way just go on and tell the jury what Mr. Edward Lewis said about how that injury occurred. A. Mr. Brubaker and Ed. Lewis and I were in the sand-house. Mr. Brubaker laid on the north side of the sand-house, and I laid on the south side, after we got our engines taken care of, and Mr. Lewis was in front of the stove, and I spoke up and asked him how Mr. Sutherland got hurt. "Well," he says, "between us three," he says, "I will tell you." He said, "We went down to—I think thirteen pocket, most forget the number of the pocket now they were at, and he stopped the engine down there to take coal." He said, "I had the relief cups open, and my hand on the throttle, and I tried to shut them with my hand and could not, and I took my foot and pushed her in the back motion, and I didn't know anything until Mr. Sutherland said: "Go ahead, you have caught me fast."

(No cross-examination.)

MRS. LOTTIE SUTHERLAND,

being duly sworn, testified as follows:

Direct Examination, by Mr. Walker.

Q. Mrs. Sutherland, were you there when your husband was brought home, the night he was hurt? A. Yes, sir.

Q. Where was you? A. I was up stairs when they brought him home.

Q. State if anybody came to your room and called you. A. Dr. Young came with a lantern.

Q. What did you do in the way of responding to the call? A. I said "all right, I will be there in a minute;" and it was not three minutes until I was down stairs.

Q. Where did you find you husband then? A. On a chair sitting beside the stove.

Q. Now was Dr. Young there? A. Yes, sir.

Q. In the room? A. Yes, sir.

Q. Who else? A. Two other gentlemen; I do not know their names, that helped carry him home. I do not know who they were.

Q. You may state to the jury whether anything was done in regard to heating any water. A. No, sir; there was no tea-kettle and no water put on the stove until six o'clock the next morning.

Q. About what time was he brought home? A. About half past one, as near as I can tell. I did not pay any attention to the clock; but I think it was about that time, because it was two o'clock before he went away.

Q. What, if anything, did Dr. Young do while there on that occasion? A. While he sat by the stove he lanced the clothing—

Q. Ripped them open? A. Yes, sir, with a lance.

Q. State if he gave any medicine, or any morphine or anything. A. Not until I pulled the lounge out of the bed-room and pulled it into the kitchen.

Q. How long after he was brought home was the lounge pulled out? A. Inside of half an hour sometime.

Q. Was he laid on it? A. Just as soon as I could put comforts on.

Q. Now, Mrs. Sutherland you may tell the jury if you left that room, went up stairs to your room during that morning? A. No, sir.

Q. How long did Dr. Young stay? A. He staid until two o'clock.

Q. Was Dr Young left with that man, with your husband, alone one minute? A. Not a minute.

Q. Until six o'clock in the morning? A. No, sir.

Q. Now, you may state to the jury whether you staid until six o'clock. A. I was there all the time.

Q. Did you leave the room at all yourself until that time? A. No, sir; I did not.

Q. Did he while he was there, or did your husband while Dr. Young was there, go on and tell anything about how that injury occurred? A. He did not talk at all. The Doctor told me to keep him as quiet as possible. He left morphine there. I gave him two doses from two o'clock until six, besides the one he gave him.

Q. He gave him one dose? A. Yes, sir.

Q. And you gave him two more? A. Yes, sir; until six o'clock in the morning.

Q. At what hour did you see Dr. Young there again? A. At six o'clock Monday morning.

Q. State how long he stayed? A. Only about an hour and he said he would come down and meet Dr. Kling. He said he wanted Dr. Kling to help him about the limb. He said the limb was broken.

Q. Was Dr. Young and your husband alone during that half hour? A. No, sir.

Q. They were not? A. No, sir.

Q. Did your husband, in your presence or in the presence of Dr. Young, go on and give any statement at that time about how he was hurt? A. No, sir.

Q. Did he talk at all? A. No, sir; he did not; I could hardly get him to talk to me at all.

Q. Now, you may tell the jury whether your husband said in your presence that he was sitting on the top of the cab at the time he was hurt? A. No, sir; he did not; he told the doctors when they asked him when the three doctors were there; he told them how he was on the apron. He never give any testimony like that.

Q. Did he say anything to this effect: that it was an accident, and nobody was to blame? A. No, sir.

Cross Examination, by Mr. Collins.

Q. Mrs. Sutherland, you have been making some threats against some of the witnesses, haven't you, since you have been here? A. No, sir.

Q. Didn't you get after Mr. Lewis yesterday? A. No, sir; I just told him I wanted to see him—

Q. I am asking you if you didn't get after him in the hall yesterday? A. All I said to him—

Q. Didn't you get after him? A. No, sir; I shook hands with him.

Q. I will ask you if you didn't threaten him there in the hall on yesterday? A. No, sir.

Q. Didn't you say that you wished he had his head all mashed? A. No, sir.

Q. Didn't you say you would be glad if he had his head mashed? A. I said I just wanted to see his wife in the same fix that I was in.

Q. Didn't you say you would like to see his head all cut to pieces? A. No, sir; I did not.

Q. And didn't you say that in the presence of Mr. Bramley? A. I said that I hoped he would be in the same box, and his wife, that my man was in.

Q. Didn't you say that you wished to see him all cut to pieces? A. I said that I hoped that they would see the same trouble that I had.

Q. And didn't you say to him that he was over here to testify against you? A. I told him I supposed he was here to do us all the harm he could do.

Q. How many times have you been after him on that subject? A. Never before. This is the second time I have seen Mr. Lewis since I left Chicago Junction.

Q. Haven't you been threatening him all the time? A. No, sir.

WILLIAM SUTHERLAND,

being re-called, testified as follows:

Direct Examination, by Mr. Pratt.

Q. I will ask you, Mr. Sutherland, whether, after the accident occurred, soon after, immediately before you got off the engine, you had a talk with Mr. Lewis, and whether in that talk, either in words or in substance, he asked you how you did it, and you responded you did not know? A. No, sir.

Q. Was there any such conversation at that time and place? A. No, sir; I just asked him to pull my boot off.

Q. That was all the conversation you had with him? A. That was all the conversation.

Q. What, if anything, was said between you and him at that time and place in reference to the apron and your forgetting the apron? A. There was nothing said.

Q. Was there, in words or in substance, anything said that you had forgotten the apron? A. No, sir.

Q. After you got to the house and your wife had been called, what can you say as to whether your wife remained with you during the remainder of the night? A. I believe she was present all the time from the time she came down stairs.

Q. You may state whether or not she was absent any such period of time as an hour and a half or two hours. A. No, sir; she could not have been absent.

Q. Was she? A. No, sir; she was not.

Q. State whether you were present with Dr. Young during that night, before five o'clock, when your wife was not there? A. No, sir; she was there all the time.

Q. Whether you had a conversation with Dr. Young that night while your wife was not present—I will leave out that last part of it. Whether you had a conversation with Dr. Young that night, in which he asked you how this matter occurred, and whether you gave him any account of the way you

received the injury? A. No, sir; was not any such questions asked me.

Q. Can you tell us what, if anything, you said to him about your having been sitting on that cab at the time you were hurt? A. No, sir; I did not say any such a thing.

Q. And about your not knowing how it happened? A. I knowed how it happened.

Q. Whether you told him? A. I never told him.

Q. And whether at that time you told him that it was an accident and nobody to blame, or anything of that kind? A. No, sir; no such words were mentioned.

Q. You may tell whether or not you at any time had any such conversation? A. No, sir; not with Dr. Young.

(No cross-examination.)

Thereupon plaintiff rested in rebuttal.

The foregoing is all the evidence introduced on the trial of this case.

Thereupon the defendant requested the court to charge the jury as follows:

1. Under the testimony given in this case, it is the duty of the jury to return a verdict for the defendant.

(Which charge the court refused to give, to which refusal of the court the defendant, by its attorney, at the time excepted.)

Thereupon the defendant requested the court to charge the jury as follows:

2. If the jury find from the testimony that the injury was caused by the negligence of the hostler, Lewis, then the verdict should be for the defendant.

(Which charge the court refused to give; to which refusal the defendant, by its attorney, at the time excepted.)

Thereupon the defendant requested the court to charge the jury as follows:

3. If the jury find that the injuries complained of were received by the plaintiff in consequence of negligence on the part of Edward Lewis, the hostler, and that Lewis was an employe of the company having authority over the plaintiff, they must also find, in order to hold the company responsible for such injury, that the negligence of Lewis was in the discharge of some duty in respect to which he was authorized to exercise authority over the plaintiff.

Which charge the court gave, as requested.

Thereupon the defendant requested the court to charge the jury as follows:

4. The testimony on both sides shows that so far as concerns the mere act of taking coal into the tender and moving the engine to and from the coal chutes, in the performance of that service Lewis, the hostler, was not exercising control or authority over the plaintiff, and if the plaintiff suffered injury in consequence of the negligence of Lewis, while they were employed in that service, the company is not liable.

(Which charge the court refused to give; to which refusal of the court the defendant, by its attorney, at the time excepted.)

Thereupon the defendant requested the court to charge the jury as follows:

5. If the jury find that in the movement of the engine at the coal chutes it was the duty of the plaintiff and of the witness Moore to select the pockets from which the coal was to be taken, and they did so select them, or they were selected by either of them, and that they, or either of them, directed the movement of the engine, and it was their duty, or the duty of either of them, to give signals for such moving of the engine, and the duty of the hostler, Lewis, to obey such signals and directions with reference to the movement thereof, and if under such circumstances the hostler, Edward Lewis, moved the engine without being signaled so to do, and from which movement the plaintiff received injuries, then and in that

case the plaintiff is not entitled to recover, and your verdict must be for the defendant.

(Which charge the court refused to give; to which refusal of the court the defendant, by its attorney, at the time excepted.)

Therenpon the defendant requested the court to charge the jury as follows:

6. The plaintiff, William Sutherland, and the hostler, Edward Lewis, were fellow servants of a common master, and if the negligence of Edward Lewis caused the injury to the plaintiff of which he complains in this case, the plaintiff is not entitled to a verdict against the defendant herein, for damages resulting from such negligence.

(Which charge the court refused to give; to which refusal of the court the defendant, by its attorney, at the time excepted.)

Thereupon the defendant requested the court to charge the jury as follows:

7. If the jury should find that the combined negligence of the hostler, Lewis, and the plaintiff, together, produced the injury of which the plaintiff complains in this case, your verdict must be for the defendant.

Which charge the court gave as requested.

Thereupon the defendant requested the court to charge the jury as follows:

8. If the plaintiff, William Sutherland, gave the hostler, Lewis, the signal to back the engine before the apron was up, and in pursuance of that order it was backed, and Sutherland's leg was caught between the apron and the top of the cab, resulting in the injury complained of in this case, he is not entitled to recover, and your verdict must be for the defendant.

Which charge was given as requested.

Thereupon the defendant requested the court to charge the jury as follows:

9. If the plaintiff, William Sutherland, was sitting on top of the cab, and while he was so sitting, and before the apron was in its proper place, the engine was moved, and he received the injuries complained of in this case, he cannot recover.

Which charge the court refused to give, to which refusal of the court, the defendant, by its attorney at the time excepted.

Thereupon the defendant requested the court to charge the jury as follows:

10. If the jury find that the plaintiff, William Sutherland, has sworn falsely with reference to any material fact in this case, knowing the same to be false, the jury is at liberty to disregard his whole testimony.

Which charge the court refused to give, to which refusal of the court the defendant, by its attorney, at the time excepted.

Thereupon, after the conclusion of the argument, the court charged the jury as follows:

CHARGE TO THE JURY.

Gentlemen of the Jury:

The plaintiff in his petition substantially charges that before January 31st, 1882, he was a common laborer employed by the defendant company at Chicago Junction, this county, to do and perform certain duties in helping to care for certain engines or locomotives that came into that station in the night time; that a man by name of Lewis was an engineer, called a hostler, in charge of the engine or locomotive in the handling of which plaintiff claims he was injured.

He alleges that in discharge of these duties, this engineer or hostler was guilty of negligence and carelessness in backing up the engine at the coal chute, by which his (the plain-

tiff's) limb was badly injured without his (plaintiff's) fault, by reason of which he has suffered much pain, been unable to perform work for a long period, and was permanently disabled for work, for all of which he asks damages.

The defendant company, by answer, admit that the plaintiff was in their employ; that he received some injury, but deny that they were negligent or careless, and aver that whatever injury plaintiff sustained was the result of his own negligence and carelessness.

Defendant also avers that the injury to plaintiff was the direct result of carlessness and negligence of the plaintiff and the negligence and carelessness of said Lewis, his fellow-servant engaged with him in the common service of the defendant company, and incident to the employment in which he was engaged, the risk of all which plaintiff took upon himself at the time he entered the service of the defendant, and that the said injury to plaintiff happened without fault or negligence on the part of the defendant company.

The plaintiff, in reply, denies all allegations of negligence on his part, and denies that said engineer or hostler, Lewis, was a fellow-servant or co-laborer. The issue as thus made by the parties it is now your duty to determine under the instructions I now give.

The theory and foundation of the plaintiff's claim is the negligence of the defendant company. The defendant company being a corporation, it necessarily acts through its agents and employes. It is, therefore, apparent that the corporation itself can be guilty of negligence only through its agents or employes who have been placed in a position to represent the company.

Negligence is the omission to do something, or the doing of something, which a prudent, careful man would not do under like or similar circumstances.

Railroad companies in operating their road are in no sense insurers.

The plaintiff as an employ of the company, assumes and takes the ordinary risks of his employment, including the carelessness and negligence of his fellow-servants or co-laborers standing on an equality with him in the discharge of duties connected with the party employing; but he does not assume or take the risk arising from the act of one superior to him having the right to direct and control him.

The railroad company in using its engines, locomotives, etc., are bound to the observance of ordinary care and prudence in order to prevent injury; that is, they are bound to use that degree of care which persons of ordinary care and prudence are accustomed to use under like or similar circumstances, in order to conduct the enterprise in which they are engaged to a successful termination, having due regard for the rights of others and the object to be accomplished, and the law places no other or higher duty upon them.

On the question as to the negligence of the defendant company, the burden of proof is upon the plaintiff; and before he is entitled to a verdict at your hands, he must satisfy you by a preponderance of the evidence that the defendant company was guilty of negligence, and that the injuries of which he complains were the direct and immediate result of such negligence.

I have said to you that the plaintiff, as an employe of the company, assumes the ordinary risks of his employment, including the carelessness and negligence of his fellow-servants and co-laborers.

A fellow servant or co-laborer is one engaged in the same business with the same duties to be performed together, without any control of the one over the other, each acting independently of the other.

You will, therefore, first determine whether the plaintiff and Lewis, the person in charge of the locomotive inflicting the injuries, were fellow-servants or co-laborers. In determining this question, you will look to the evidence, and if

from that you should find that they were fellow-servants or co-laborers, you need go no further in your examination of the evidence, but will return a verdict for the plaintiff.

Should you, however, find that the plaintiff and said Lewis, the person in charge of said locomotive, were not fellservants or co-laborers, your next inquiry will be, was the defendant company guilty of the negligence charged?

In determining this question, you will also look to the evidence, and if from this you fail to find that the defendant company was guilty of the negligence charged, but that it used that degree of care and prudence which persons of ordinary care and prudence are accustomed to use under like or similar circumstances, your verdict will be for the defendant.

Should you, however, find that the plaintiff and Lewis, the person in charge of said locomotive, were not fellow-servants or co-laborers, and that the defendant company was in fact guilty of negligence, your next inquiry will be, was the plaintiff guilty of contributory negligence.

Contributory negligence in its legal sense is such an act or omission on the part of the plaintiff amounting to a want of ordinary care as concurring or co-operating with the negligent act of the defendant is the proximate cause or occasion of the injury complained of. To constitute contributory negligence there must be want of ordinary care on the part of the plaintiff, a proximate connection between that act or omission and the injury complained of.

In this connection, I wish to say to you, gentlemen, that it is an universal rule of law that there can be no recovery for an injury caused by the mutual negligence of both parties. Therefore, should you find from the evidence that the injury complained of would not have occurred except for the negligence of the plaintiff concurring with that of the defendant, your verdict must be for the defendant.

Should you, however, find from the evidence that the plaintiff and Lewis, the person in charge of said locomotive,

were not fellow servants and co-laborers, that the defendant company was in fact guilty of negligence, that the plaintiff was not guilty of contributory negligence, then your verdict will be for the plaintiff.

Should you find the plaintiff entitled to your verdict, he is entitled to recover such sum as you may find from the evidence will compensate him for any injury you may find he has received, the pain and suffering, if any, that have resulted to him from such injury, loss of time, if any, that you may find has resulted to him from it, the effect, if any, upon his health and ability to labor, and the pain, if any, which you may find from the testimony it is reasonably certain will necessarily result from the injury in the future.

You, gentlemen, are the sole judges of the facts proven, the weight of the evidence and the credit to be given to witnesses, and it is now your duty to carefully and candidly consider all the evidence submitted to you and from that under the instructions I have given you, to render such a verdict as may satisfy your consciences.

On retiring to your room, you will elect one of your number foreman. I have prepared for you two verdicts, one for the plaintiff and one for the defendant. When you have agreed upon your verdict, it will be signed by your foreman.

You may remain in session, should you not agree, until six o'clock, and at that time you may separate for supper and return at seven and remain until nine. Should you not agree by that time, you may adjourn and resume your sitting at eight o'clock tomorrow morning. Should you, however, agree, and the court not be in session before that time, you may seal up your verdict and return it to the court in the morning.

During the adjournments, gentlemen, I desire to call your attention to the same caution that I have heretofore given you in this case.

Thereupon this cause came on to be heard upon the motion of the defendant for a new trial, and was argued by counsel. On consideration whereof the court overruled said motion, to which ruling of the court the defendant at the time excepted. And here presents to the court its bill of exceptions taken on the trial of said cause, which being examined and found to be correct, is signed and sealed by the court and ordered to be made a part of the record in this case, this 6th day of January, 1894, and during the term of court at which said cause was tried.

J. L. GREENE [SEAL.]
Judge of said Court.

EXHIBIT "No. 4."

(This exhibit comprises the Application for Membership of William Sutherland in the Baltimore and Ohio Railroad Employes' Relief Association, with the constitution of the association attached, and is bound in with a specially marked copy of the printed record, filed with the Clerk of the Supreme Court for the use of the judges.)

EXHIBIT "No. 5."

Present: *Mr. Severance*, on behalf of the plaintiff, and *J. H. Collins*, on behalf of the defendant.

WILLIAM H. HARRISON,

of lawful age, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

1 Q. State your name, age, occupation and place of residence? A. My name is W. H. Harrison; I am nearly sixty-one years of age. My occupation, is Superintendent of Motive Power, Trans-Ohio Div. B. & O., and I reside in Newark, Ohio.

2 Q. State how long you have occupied your present position, and state fully and in detail your official position with the Baltimore & Ohio Railroad Company; what your authority is, and what territory it covers? A. I have been in the service of the Baltimore and Ohio Railroad Company thirty-nine years yesterday. I have been in my present position as Superintendent of Motive Power since December, 1880; and my duties are to have supervision and control of the machinery department of the Baltimore and Ohio Railroad Trans-Ohio division; and the territory covers from Bellaire, Ohio, to Chicago, Ill., Sandusky, Ohio, Columbus, Ohio, Chicago Junction, Ohio, and all branches and all shops of the machinery department. I have full control of the employes of the machinery department, the repairs of locomotive engines and cars, and all matters pertaining to machinery department business.

3 Q. State fully and in detail, what, if any, authority you had in January, 1882, and since, over the shops at Chicago Junction? A. I had the same authority at that time I have at present, which is full authority over all the shops of the trans-Ohio divisions, including Chicago Junction.

4 Q. Who was during January, 1882, and before and since the principal officer of The Baltimore and Ohio Railroad Company's shops at Chicago Junction. Give his name, and also his authority in detail? A. Mr. Frank Gunther was the general foreman at Chicago Junction shops when I took charge in 1880, and since Mr. Gunther left the service—well, I think he remained in the service until, probably 1884; I cannot be positive. He was there in 1882, I think; he was in charge until after 1884, and then Mr. Engler took charge of the shops in place of Mr. Gunther, and he remained there until the time Sandusky was closed, and Mr. Taylor is now Master Mechanic of Chicago Junction shops.

5 Q. What other employe or officer of the Baltimore and Ohio Railroad Company at Chicago Junction had authority or control over other employes? A. There was no officer

of the railroad company outranked Mr. Gunther in authority at Chicago Junction, Ohio. Mr. Gunther had control over the employes in machinery department at Chicago Junction.

6 Q. What officer or agent of the company had authority to employ and discharge employes at this shop at Chicago Junction? A. Mr. Gunther alone was general foreman at that time.

7 Q. Had any other agent, officer or employe at Chicago Junction authority to employ or discharge employes at the shops there except the one above named? A. No, sir; none that I know of. None at all.

8 Q. Did you know, or do you know, Edward Lewis, who was a hostler at the Chicago Junction shops in the month of January, 1882; and if so, what were his duties? A. Well, I simply know there was a man there by that name; I knew the man when I saw him. The duty of the hostler is to get the engines out and fired, get the coal, water, sand, and have them turned on the table, put in the house and have them taken out of the house.

9 Q. Did you know, or do you know, the plaintiff in this suit, William Sutherland, who was employed as a laborer at the Chicago Junction shops during the month of January, 1882, and if so, what were his duties? A. I know there was a man there employed as an ordinary laborer, to do whatever he was called upon to do.

10 Q. What, if any, authority did the said Edward Lewis have over the said Sutherland? A. None whatever, except as a co-laborer, working together.

11 Q. Had said Lewis, the hostler, any authority to employ, discharge, or in any manner control the said Sutherland in his employment, in service of the Baltimore and Ohio Railroad Company? A. Not a bit in the world.

12 Q. What were, at the time named, the relations existing between the said Lewis, the hostler, and the said Sutherland, the laborer, in the Chicago Junction shops? A. Nothing but co-laborers. By co-laborers, I mean there was one of

them a hostler, but they were both employes of the Railroad Company, working together.

13 Q. Suppose that Edward Lewis, as hostler, was in charge of an engine at the coal chutes for the purpose of coaling it, and Sutherland was on the engine as a laborer, assisting him, and suppose that Sutherland should disobey Lewis' instructions, what would Lewis do? A. The only thing Lewis could do in the world would be to report him to the general foreman. He couldn't discharge him, or do anything else with him.

14 Q. Suppose that Lewis, as hostler, and Sutherland as a laborer assisting him, were coaling an engine at the coal-chutes, what was Sutherland's proper position on the engine? A. The engine would go to the coal house for coal. The hostler is supposed to run the engine under the coal-chute; the laborers at the coal-chute are supposed to pull the apron down to run into the tender, to fill the tender; and it is their duty to put the apron up in position as soon as the tender is filled, and the hostler's duty is to run the engine to the shops.

15 Q. What is the laborer's proper position? A. His proper position is on the tender while coaling, and if any should remain in the chute, to clean off the coal chute.

Cross-Examination by Mr. Severance, Attorney for Plaintiff.

1 Q. You say Mr. Gunther was in charge of the chutes at Chicago Junction, in January, 1882, and had authority to employ and discharge men. Had he not authority to direct the men in their work? A. Certainly he had; that was his duty.

2 Q. Any authority or instructions he gave to his men, were they in duty bound to obey? A. They were in duty bound to obey any orders or instructions given to them by Mr. Gunther.

3 Q. Does not the hostler have full charge of an engine from the time the engineer brings it in, leaves it, until it is taken to the round-house, direct the work to be done, and the general control? A. It is the duty of the hostler to take all

locomotive engines left at the station. He is to have the fires cleaned, give them coal, water, sand, have them turned on the table and run into and out of the round house, and get them ready for service on the road. He has the assistance of laborers and their co-laborers, and they must work together for this particular purpose, all of which is under the supervision of the general foreman, or master mechanic.

4 Q. Does not the hostler direct any of this work? A. The hostler is to direct his helper to do whatever duties he wishes him to assist in performing these duties; and *vice versa*, the helper with the hostler can have the hostler move the engine, if the hostler thinks it proper to do so, and if not, he can refuse.

5 Q. Is not the engine when placed at the coal-chutes for coal, supposed to remain stationary until the work of taking coal, closing the pocket and putting up the apron is completed? A. It is. It is certainly right and proper that the engine after being at the coal-chute and the apron in the tender and taking coal, that the apron should be put up before the engine is moved away from the chute; and any failing to do that on the part of those whose duty it is to fill this tender is a violation of the duty.

6. Q. In your answer to question 15 of your direct examination, you say the proper position of the helper while taking coal at the chutes is on the top of the tender. Suppose, after the coal is dropped from the pocket into the tender the trap-door to the pocket will not close of itself, must not the helper get in position to close that trap before putting up the apron? A. The trap-door spoken of is an inside door to the coal-chute working on hinges, hanged from the top part of the door, and as soon as the coal is removed from it the trap-door will fall back to its proper position, and the lever will place its pin up and hold it at the bottom, which can be done either by a bolt or bar, and ordinarily is intended to work automatically, and to fasten that door in case it will not do this itself. It is the duty of the helpers to put it in position. In any event it is the duty of the helper and hostler

to see that it is in the proper position before taking coal, and if it is not they are responsible for their own neglect.

7 Q. If the helper could not perform all these duties of closing the trap, etc., mentioned in last question, while standing on the tender, must he not of necessity assume some other position? A. No, not necessarily so, from the fact that if the inside apron is not pinned it does not prevent him from throwing the apron up to the pin. It is not necessary. It is only put there, that inside apron, as simply a guard to keep from knocking the apron off as the coal falls into the chute.

8 Q. But is it not a part of the duties of this helper to properly close the pocket ready to again receive the coal? A. It certainly is his duty. That is what he is there for; and, as I said before, that while it is the duty of the helper to see the chutes are all intact for the next day, it is not absolutely necessary that the inside door should be fastened by these men, if they are in a hurry at that time. It won't prevent filling the tender the next day; but it is the duty of all there to see that they are intact and ready for the reception of coal for the next filling.

Q. Is it not a fact that whatever directions or instructions were given by men employed by Mr. Gunther they were in duty bound to obey? A. It was their duty.

WILLIAM H. HARRISON.

(Certificate of Notary Public attached.)

155 Supreme Court of Ohio.

THE STATE OF OHIO, }
City of Columbus, } ss:

I, Josia B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing printed matter is a true and correct copy of the proceedings had in the court of common pleas and circuit court of Huron county in the case of The Baltimore & Ohio Railroad Company against William Sutherland, brought into this court on error to the circuit court of Huron county and filed in this court in said cause, which is numbered 4099.

Seal of the Supreme Court of the State of Ohio.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court, at Columbus, this 15th day of May, A. D. 1895.

JOSIAH B. ALLEN, *Clerk,*
By GEO. H. KOLKER, *Deputy.*

Endorsed on cover: Case No. 15,914. Ohio supreme court. Term No., 626. The Baltimore and Ohio Railroad Company, plaintiff in error, *vs.* William Sutherland. Filed May 23rd, 1895.

In the

Supreme Court of the United States.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Plaintiff in Error,* v. WILLIAM SUTHERLAND, *Defendant in Error.*	Petition in Error.

Brief for Defendant in Error on his Motion to Dismiss and Affirm Judgment of State Court.

MOTION TO DISMISS AND AFFIRM.

The said Defendant in Error has filed his motion to dismiss said petition in Error and affirm the judgment of the State Court, which motion is as follows:

[Copy of Motion.]

IN SUPREME COURT OF THE UNITED STATES.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Plaintiff in Error,

v.

WILLIAM SUTHERLAND,

Defendant in Error.

Motion to Dismiss Petition in Error and Affirm Judgment of State Court.

Now comes the said William Sutherland, defendant in error, and for his statement of the grounds of this motion, says:

That the petition in error of the above named plaintiff in error is founded upon an action begun on the 12th day of August, 1882, in the Court of Common Pleas, of Huron county, Ohio, to recover damages for injuries by reason of negligence. That, on the petition of the defendant below said cause was removed to the Circuit Court of the United States, for the Northern District of Ohio, where, after judgment for plaintiff below, the case was brought to the Supreme Court of the United States on error, and by that Court reversed for defect in the petition for removal, remanded to said Circuit Court with direction to remand the same to the State Court, which was done accordingly.

Thereupon, and after the lapse of one or more terms of said State Court a second petition to remove the same was filed, and said cause was again removed to the Circuit Court of the United States, and, which Court, on motion of the defendant in error remanded the same again to said State Court, in which Court no objection was made for any

irregularity or want of jurisdiction to try the same, but was tried to a jury verdict, and judgment thereon, a motion for a new trial made, and overruled by the Court, in which no claim of want of jurisdiction, or irregularity in the remanding of said cause was made. After which said cause was taken to the State Circuit Court, and to the Supreme Court of the State, both of which Courts affirmed the judgment of said Court of Common Pleas, and upon which the petition in error is founded.

Said defendant in error now moves the Court to dismiss the petition in error in this case for the reasons following to wit:—

First—Because no Federal question was in fact involved in the case in the State Courts.

Second—Because no Federal question was ever in fact made or argued in the State Courts in said case.

Third—That if such Federal question was in fact involved, the same was waived by said defendant below, by not being presented at the proper time in said State Court.

Fourth—No Federal question was ever presented to or decided by said State Courts or any of them.

Fifth—Because no error prejudicial to the said plaintiff in error appears on the face of said record, and no error in fact exists therein.

For the reasons above set forth this defendant in error moves the Court to dismiss the petition and writ of Error in this case, and restore to him all rights in the premises.

Second—In case the Court should be of opinion that said motion ought not to prevail, then the said defendant in error moves the Court to affirm the judgment of the State Court on the ground, and for the reason that the petition in error in this case is for the purposes of delay only, that the same has no substantial ground of error upon which to rest, and said judgment of said State Court ought to be affirmed and enforced.

GEORGE R. WALKER,
WARREN SEVERANCE,
and JOHN H. DOYLE,
Attorneys for Defendant in Error.

A copy of which motion has been duly served on Hon. J. H. Collins, counsel for said plaintiff in error, which service, with copy also of this brief, and of the printed record in the case is duly evidenced and certified in this case.

The single ground alleged as error is, in substance, that the Circuit Court of the United States for the Northern District of Ohio erred in remanding said cause to the State Court, and, that, as a consequence, the Court of Common Pleas of Huron county, Ohio, did not have jurisdiction to try the case.

It would seem that the simple statement of the history of the case, which is briefly done in the motion to dismiss, and, as shown in the printed record, would be a sufficient presentation of the case to secure the dismissal of this petition in Error by this Court.

The law of Congress authorizing and regulating removals of cases from State to Federal Courts, was not made for the purpose of enabling certain parties to escape from justice by wearing out an opponent, but for just, wise and proper ends, and, as held, and interpreted by this Court, serves those purposes. Very few laws are enacted which may not, for the time being be taken advantage of for the purposes of oppression, but these cases are in time reached and corrected, as in many cases, which, like the one at bar have been, for delay merely, under the pretext of there being a Federal question to be decided, brought to this Court, under the forms of a petition in Error.

The pretense is, to obtain a construction of the statute regulating removals, etc. The construction they seek may be found in the case of *Fisk* v. *Henarie*, 142 U. S. Reports, p. 459.

The statute referred to, viz.: of March 30, 1887, and of August 13, 1888, gives to the United States Circuit Court exclusive jurisdiction of the question, upon that Court deciding to remand a case to the State Court, and that construction of the statute has been held and uniformly maintained by the United States Supreme Court, in numerous cases, which, on various pretexts, have been brought here for decision. And the spirit of the law has been held to exclude the writ of man-

damus, whereby to reach and overrule the action of the Circuit Court in the premises.

And no State Court has any authority or power to overrule the United States Circuit or any other Federal Court on that question.

"Under the act of 1887, the power of the Supreme Court to relieve by mandamus when cause removed is improperly remanded, is taken away."

In re Penna. Company, 137 U. S., p. 451.

"An order remanding a cause from the Circuit Court to the State Court * * * is not a final judgment or decree, reviewable here."

Birdsie vs. Schæfer, 140 U. S., 117.

It is asserted in the specification of errors that the question of jurisdiction of the State Court was made and argued in the Court of Common Pleas.

To disprove that assertion we have had printed the whole of the record used in the State Supreme Court. An examination of which shows that no mention was made in the Court of Common Pleas of any defect or irregularity in the order remanding the case, nor that any defect, or want of jurisdiction was claimed or existed, notwithstanding the certificate of the Chief Justice of the State Supreme Court, which, while we do not criticise, yet find authority to dispute.

"The certificate of the presiding Judge of the State Court cannot confer jurisdiction upon the Supreme Court of the United States to re-examine the judgment of the State Court if a Federal question is not in fact involved."

Powell vs. Brunswick, 150 U. S., 433.
Hamblin vs. Western Sand Co., 147 U. S., 531.

"A definite issue * * * must be deducible *from the record* before the State Court can be held to have disposed of a Federal question by its decision."

150 U. S., 433, and see
133 U. S., 65.

"To give to the United States Supreme Court jurisdiction under Revised Statutes, § 709, it *must appear of record* that a *Federal question was specifically set up* or claimed in the State Court *at the proper time, and in the proper way*, and that its decision was against it."

Brooks vs. Missouri, 134 U. S., 394.
French vs. Hopkins, *Ib.*, 524.
and see 128 U. S., 132.
137 U. S., 48.
139 U. S., 462.

"A title is not claimed under an Act of Congress so as to give the Supreme Court jurisdiction to review the judgment of a State Court denying the validity of such title *where the claim is made only in the Argument of Counsel and not in the pleadings.*"

Yesler vs. Harbor Line Comr's,
146 U. S., 646.

The proper time to make the question of jurisdiction in this case was, we contend, before the case was submitted to the jury, and the proper place to have made the question was in the defendant's answer.

Herman on Estoppel and Res Judicata,
vol. 1, p. 451, § 389, and cases there cited.

By not making the question at that time and in that way the defendant below waived its right to make it, and is estopped from doing it in a Court of review.

The Court of Common Pleas had jurisdiction of the subject matter of the action, and of the defendant, by service of process, and if the defendant claimed immunity from the process of the Court it had the personal privilege to waive it or to assert it at the proper time and in the proper way. This privilege it has waived, and the Court cannot be said to have had the question before it.

The State Court could not have entertained the question as it had no power to decide it, except to have rejected it if made.

Exclusive jurisdiction over the question of remanding cases to the State Court was by Congress lodged with the United States Circuit Court.

Not even this Court could take cognizance of the question, where the Circuit Court decided to remand a case to the State Court, as this court has uniformly held since the passage of the act of March 3, 1887.

We now say: No Federal question was ever before the State Courts in the case.

First—Because none was made in the Court of Common Pleas of the state.

Second—Because neither that court nor any State Court had power to entertain the question if made.

Third—Because Congress has not conferred on the State Court jurisdiction to overrule the Circuit Court of the United States on the remanding of a case, and no other authority could confer that power on the State Court.

No Federal question was decided in the case by the State Courts, nor by any of them.

It is true that in the petition in error (see Record p. 17) filed by the defendant below, plaintiff in error, in the State Circuit Court, the claim was made that the case was not "legally remanded," but the State Circuit Court could only entertain questions made in the record. It could not consider anything outside of it, nor could the State Supreme Court do more, nor was any other reference ever made in the State Court to the question in any other form, by brief or otherwise, until after final disposition of the case in the State Supreme Court.

The first removal of this case to the United States Circuit Court was on the ground of diverse citizenship. This Court found the petition for removal to be insufficient, and ordered the case remanded to the State Court.

The second removal was on the ground of alleged local prejudice, and this Court has held that "The prohibitions, against appeal and writs of error in the act of 1887, apply, not only to removals on account of prejudice or local influence, but also to other causes."

Morey v. Lockhart, 123 U. S., p. 56.

As to the motion to dismiss, will say: Even though the Court should find a Federal question in any form, so that the Court would not feel justified in allowing the motion to dismiss, the Court will inquire further, under the motion to affirm the judgment of the State Court, and, having the full printed record before it, determine whether there is in fact any merit in the contention of the plaintiff in Error, and finding that there is not, will affirm the judgment of the State Court.

Arrow Smith v. Harmoning, 118 U. S., p. 194.

We submit the case in the confident belief that the Court will find that the petition in Error in this case has nothing in the record upon which to stand, that its sole ground is the certificate of the Chief Justice of the State Court, which is not sustained by the records, and that the petition in error should be dismissed and the judgment of the State Court affirmed.

All which is respectfuliy submitted.

G. R. WALKER
and W. SEVERENCE,
Attorneys for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Plaintiff in Error,
vs.
WILLIAM SUTHERLAND,
Defendant in Error.

Brief of Defendant in Error on Motion to Dismiss and affirm.

The original petition was filed in the Court of Common Pleas of Huron County, August 12th, 1882. It was removed to the United States Circuit Court, for the Northern District of Ohio, and there tried to a jury, and the defendant brought the case to this Court on error. On the 29th day of January, 1890, this Court found the petition for removal to be defective, the Circuit Court without jurisdiction, and reversed the judgment sending its mandate to the Circuit Court to remand the case to the State Court. The case was Number Thirty Eight on the Docket of this Court for the October Term 1889. On August 13th, 1890, the Circuit Court remanded the case to the State Court in obedience to the mandate of this Court. Thereupon the plaintiff in error, The Railroad Company,

again attempted to remove the case, under the local prejudice act, a lapse of more than eight years having occurred between the commencement of the suit and this last attempt at removal.

The Circuit Court on the 4th of January, 1893, remanded said cause to the State Court, and in the State Court the cause was tried in November, 1893, resulting in a verdict for the plaintiff below. The case was taken on error by The Railroad Company to the State Circuit Court and the judgment affirmed, then to the Supreme Court of the State where the judgments of the Courts below were also affirmed.

The jurisdiction of this Court is now invoked to reverse the judgments of the State Court, we presume on the ground that the order remanding the case was void, and that the State Court was without jurisdiction.

FIRST.

In the Court of Common Pleas of Huron County, the Court of original jurisdiction and to which the case was remanded, no objection to the jurisdiction was made, and no question of the validity of the order remanding was made. The question was not presented in any form to that Court, either by pleading, motion, or oral objection.

The reviewing Courts in Ohio, therefore, could have no such question presented to them. The proceedings in error brought up only the questions presented to and decided by the Trial Court, and unless the question was made in the Trial Court, it could not be made in the Reviewing Courts.

SECOND.

But even if it was made there, it could present no question upon which the parties are entitled to bring the case here. The Circuit Court decided to remand the case, and did so, and that judgment is not the subject of appeal or error.

If this Court cannot review or reverse the action of the Circuit Court in remanding, it certainly cannot review the action of the State Court in resuming jurisdiction in accordance with the order remanding.

The Statute, Act of March 3d, 1887, as corrected by Act of August 13th, 1888, provides that "whenever any cause shall be removed from any State Court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed, and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed.

This Statute has accomplished two things:

First. The order remanding the cause is a valid order. It cannot be held to be void, and hence the effect of the order is to, at least, reinvest the State Court with jurisdiction, and this Court will not entertain a proceeding in error based only upon the fact, that the State Court exercised the jurisdiction which it originally had, and which the Federal Court decided was wrongfully interfered

with. The Federal Court refusing to exercise jurisdiction, the State Court committed no error in exercising the jurisdiction conferred upon it by law.

Second. While before the Act of 1887, the the order remanding would be valid until reversed or modified by a Court having appellate jurisdiction over the Court granting the order remanding, that power of reversing or modifying is now taken away from the Appellate Courts of the United States and the order remanding is final.

The cases on this subject have already become somewhat numerons:

Wilkinson vs. Nebraska, 123 *U. S.* 286.
Morey vs. Lockhart, 123 *U. S.* 56.
Sherman vs. Grinnell, 123 *U. S.* 679.
C. B. & Q. R. R. Co. vs. Gray, 131 *U. S.* 396.
Richmond & D. R. R. Co. vs. Thomp. 134 *U. S.* 45.
Texas Land Company vs. Scott, 137 *U. S.* 436.
Gurnee vs. Patrick Co. 137 *U. S.* 141.
Birdseye vs. Schaeffer 140 *U. S.* 117.
Joy vs. Adelbert College, 146 *U. S.* 355.
Bender vs. Penn. Co., 148 *U. S.* 502.
C. St. P. &c. vs. Roberts, 141 *U. S.* 690.
Texas Land Company vs. Scott, 140 *U. S.* 700.
McLish vs. Roff, 141 *U. S.* 661.

In the Joy case, 146 U. S. 355, the removal was under the local prejudice act, and the Court below filed a certificate of the ground upon which the case was remanded, but this Court held that it had no power to review the question.

THIRD.

The removal in this case was not taken until long after the Act of 1887 was in force. The former removal was ineffectual for any purpose. The reservation or proviso in the Act of 1887, that the Act shall not effect the jurisdiction over any suit removed from a State Court before the passage of the Act, does not help the case of the plaintiff in error, nor give this Court jurisdiction over a writ of error from a judgment remanding a cause to the State Court, where the removal was after the Act. It has been held that this Court was without jurisdiction over such writ of error when the suit was *removed* before the Act of 1887, but remanded after the Act:

Gurnee vs. Patrick Co., 137 *U. S.* 141.

FOURTH.

There can be no federal question presented by the record or judgment of the Supreme Court of Ohio, which judgment is sought to be reviewed here.

The only federal question that ever was in the case has been passed upon by the Federal Court. There was once in the case the question of whether the case was properly removed to the Federal Court. The State Court never had any power over that question, and never attempted to exercise any. It left the question to the Federal Court, where it belonged, and the Federal Court having decided it, the State Court has not been called

upon or attempted to reverse or modify or do anything in conflict with the decision of the Federal Court on that question.

If the State Court had got into conflict with the Federal Court, as for instance it had exercised jurisdiction after the Federal Court had decided that the case was properly removed, and had proceeded to enter judgment, that would have presented a different case.

But if there has been any error committed here, on the question of removal, it was committed not by the State Court, but by the Federal Court.

I submit that the error, if it be one, of the Federal Court in remanding the cause cannot be made a question in the State Court so as to present any federal question that will give this Court jurisdiction over the judgment of the State Court.

Formerly the judgment of the Circuit Court remanding was the subject of review in the Appellate Courts, but Congress has seen fit to take away that power. It seems to me to be illogical to claim that while you cannot review the judgment of the Circuit Court, which is final, the parties may present the question to the State Court, and if that Court does not reverse the Federal Court, its refusal to do so may be assigned as error here.

The State Court had no power to modify or reverse the order of the Federal Court, and hence its refusal to do so cannot be assigned as error.

FIFTH.

Mr. Walker, in his Brief, has correctly shown that the question, even if it was in any form possi-

ble, was not presented to the State Court. I do not care to travel over that ground, but call the Court's attention to the following cases:

Dower vs. Richards, 151 *U. S.* 658.
Kansas Endow. Co vs. Kansas, 120 *U. S.* 103.
Church vs. Kelsey, 121 *U. S.* 282.
Clark vs. Pennsylvania, 128 *U. S.* 395.
Geay vs. Coan, 154 *U. S.*, 589.
Newport Light Co. vs. Newport, 151 *U. S.* 527.
Morrison vs. Watson, 154 *U. S.* 111.

SIXTH.

Although the question is not in my judgment before the Court, I insist that the order remanding was properly granted.

Fisk vs. Henarie, 142 *U. S.* 459.
Hanrick vs. Hanrick, 153 *U. S.* 192 *and cases cited.*

SEVENTH.

There being no question in the record which this Court will review, the proceeding should be dismissed.

JOHN H. DOYLE,
Solicitor for Defendant in Error.